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In the Supreme Court of the United States

OCTOBER TERM, 1975

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

RUBY M. LUCAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a-27a) is not yet reported.

JURISDICTION

The order of the district court, holding unconstitutional certain provisions of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii), was entered on March 21, 1975 (App. B, *infra*, pp. 28a-29a).[1] A notice of appeal to this Court was filed on

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[1] The court's order does not refer directly to the constitutional issue, but that order is based upon the court's decision,

April 15, 1975 (App. C, *infra*, p. 30a). On June 4, 1975, Mr. Justice Brennan extended the time for docketing the appeal to and including July 14, 1975. This Court's jurisdiction is conferred by 28 U.S.C. 1252. *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op. 11, n. 8.

QUESTION PRESENTED

Whether Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act violate the Due Process Clause of the Fifth Amendment insofar as they condition certain illegitimate children's receipt of surviving child's insurance benefits upon a showing that a deceased male wage-earner was their father and was, at the time of his death, living with them or contributing to their support.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent provisions of the Fifth Amendment and the Social Security Act are set forth in Appendix D, *infra*, pp. 31a-33a.

STATEMENT

1. This is an appeal from a decision of a single-judge district court holding unconstitutional Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii). The constitutionality of these statutes is pres-

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set forth in its opinion, that the statutory bar to the payment of benefits to appellees was unconstitutional.

ently before the Court in *Norton* v. *Weinberger*, No. 74-6212, question of jurisdiction postponed until hearing on the merits, June 30, 1975. We therefore only briefly summarize the statutory scheme here.

Surviving child's insurance benefits are payable to children under the age of 18 (or, in the case of full-time students, under the age of 22) who were dependent upon a deceased wage-earner at the time of his death. Section 202(d)(1)(C) of the Act.[2] The Act establishes a presumption of dependency in the case of legitimate children who have not been adopted by another individual. Section 202(d)(3) of the Act. A similar presumption applies to illegitimate children who satisfy certain statutory criteria.[3]

Children who are not within any of these categories, *i.e.*, legitimate children who have been adopted by another individual and other illegitimate children, are not presumed to have been dependent upon their deceased father. In order to receive surviving child's insurance benefits, such children must show that the deceased wage-earner was their father and that, at

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[2] We describe the statutory scheme here only as it operates upon the death of a *male* wage-earner, as that is the circumstance of this case.

[3] Dependency is presumed in the case of an illegitimate child (1) whose parents went through a marriage ceremony that was rendered invalid by a non-obvious legal impediment or (2) whose father (a) acknowledged his paternity in writing, (b) had been decreed by a court to be the child's father or (c) had been ordered by a court to support the child because the child was his son or daughter. Sections 202(d)(3) and 216(h)(2)(B) and (h)(3) of the Act.

the time of his death, he had been living with them or contributing to their support. Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Act.

2. Appellees are illegitimate children who applied for surviving child's insurance benefits on the earnings account of their deceased father, Robert E. Cuffee. The Secretary determined that appellees had failed to demonstrate either that the statutory presumption of dependency was applicable in the facts of their case (Tr. 43)[4] or that Cuffee had been contributing to their support or living with them at the time of his death (Tr. 45). The Secretary accordingly denied their application for benefits (Tr. 4, 45).

Appellees then commenced this suit in the district court pursuant to Section 205(g) of the Act, claiming first that the Secretary's decision was not supported by substantial evidence and, subsequently, that Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Act violate the Fifth Amendment insofar as they require illegitimate children to demonstrate dependency without requiring a similar showing in the case of legitimate children.[5] The district court held

[4] "Tr." refers to the transcript of the administrative proceedings.

[5] The district court initially held that the Secretary's factual determination that appellees did not meet the requirements of the statute was supported by substantial evidence, but remanded the matter to the Secretary to determine whether appellees were legitimate children under state law as the issue of a valid common law marriage (App. A, *infra*, pp. 6a-8a). After the Secretary determined that they were not, appellees sought reversal of the Secretary's decision, and also challenged for the first time the constitutionality of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Act. The district court found the Secretary's determination concerning common law marriage to be supported by substantial evidence (App. A, *infra*, p. 9a)

[6] We are sending appellees a copy of that memorandum.

those statutory provisions unconstitutional (App. A, *infra*, pp. 1a-27a) and ordered the payment of benefits to appellees (App. B, *infra*, pp. 28a-29a).

THE QUESTION IS SUBSTANTIAL

The constitutionality of Sections 202(d)(3) and 216(h)(3)(C)(ii) is before the Court in *Norton* v. *Weinberger*, *supra*. For the reasons stated by the district court in that case, we believe that those provisions are constitutional. Moreover, as we pointed out in our memorandum filed in this Court as respondent in that case,[6] the issue is important to the administration of the Social Security Act and is currently being litigated in several lower federal courts. But if the constitutional issue presented here is resolved by this Court in *Norton*, plenary review of this case will not be necessary.

CONCLUSION

The appeal should be held pending this Court's disposition of *Norton* v. *Weinberger*.[7]

Respectfully submitted.

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JULY 1975.

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[7] In view of the fact that the question of jurisdiction in *Norton* has been postponed until the hearing on the merits, the Court alternatively may deem it appropriate to note probable jurisdiction in this case, which does not appear to raise the jurisdictional question posed by *Norton* (see *Weinberger* v. *Salfi*, *supra*, slip op. at 11, n. 8), and consolidate the two cases for argument.

APPENDIX A

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 4845

RUBY M. LUCAS and DARIN E. LUCAS, Infant Minors, By Their Mother and Next Friend, BELMIRA LUCAS

v.

SECRETARY, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA

OPINION

PETTINE, Chief Judge

This action is presently before the court to consider the parties' cross-motions for summary judgment. The action was originally filed in 1972 to seek review under 42 U.S.C. § 405(g) of the final decision of the Secretary of the Department of Health, Education and Welfare (hereinafter "Secretary") denying plaintiffs surviving child's benefits under the Social Security Act as the children of a deceased wage earner. 42 U.S.C. § 402(d).

STATUTORY SCHEME

On October 24, 1968, Belmira Lucas filed for Surviving Child's Insurance benefits on behalf of her minor children Ruby Marie Lucas and Darin Edward Lucas, on the earnings record of Robert E.

Cuffee, a deceased insured. The Social Security Act (the "Act"), 42 U.S.C. § 402(d), details who is eligible for such benefits and provides, in pertinent part:

> "[§ 402] *Child's Insurance Benefits*
>
> (d)(1) Every child (as defined in section 416 (e) of this title) . . . of an individual who dies a fully or currently insured individual, if such child—
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> (A) has filed application for child's insurance benefits, [and]
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> * * *
>
> (C) was dependent upon such individual—
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> * * *
>
> (ii) if such individual has died, at the time of such death,
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> * * *
>
> shall be entitled to a child's insurance benefit."

Thus, in theory, in order to be eligible for surviving child's benefits, an applicant must establish, first, that he is the child of the deceased insured and, second, that he was dependent upon the deceased insured at the time of the latter's death. The Act goes on to define the term "child" in 42 U.S.C. § 416(e) and (h). Subsection (e) provides that "child" includes a legitimate or legally adopted child of an individual and certain step-children. In addition, subsection (h) provides that certain biological children of the deceased, although considered by law to be illegitimate, also fall within the statutory definition of "child". These categories are described in the following statutory provisions. Section 416(h)(2)(A) of 42 U.S.C. provides that the statutory term "child" includes a claimant who would take property as a child under the laws of intestate succession of the State of the deceased's domicile at death. Section 416(h)(2)(B) provides that the statutory definition of "child" also includes the biological child of a purported marriage which is invalid due to a non-obvious legal impediment. Lastly, § 416(h)(3)(C) includes within the statutory definition of "child" the son or daughter of a deceased insured who:

> "[42 U.S.C. § 416(h)(3)(C)(i)] (I) had acknowledged in writing that the applicant is his son or daughter,
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> (II) had been decreed by a court to be the father of the applicant, or
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> (III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,
>
> and such acknowledgment, court decree, or court order was made before the death of such insured individual, or
>
> (ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died."

A claimant who has established that he meets the statutory definition of "child" under 42 U.S.C. § 416

(e) or (h) must next show that he meets the age and marital requirements of 42 U.S.C. § 402(d)(1)(B),[1] and must show that he was "dependent" upon the deceased insured pursuant to 42 U.S.C. § 402(d)(1)(C)(ii). However, § 402(d)(3) conclusively presumes that the requisite dependency exists as to a legitimate or adopted child of the insured, as defined in § 416(e) and (h)(2)(A), and as to any claimant who falls within one of the statutory definitions of "child" provided in § 416(h)(2)(B) or § 416(h)(3).[2] Thus, the net operative effect of these provisions, when read together, is to relieve *all* subclasses of applicants for surviving child's benefits, except one, of the burden of demonstrating actual dependency on, or indeed any monetary support by, the deceased insured at the time of death. The only sub-

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[1] 42 U.S.C. § 402(d)(1)(B) provides:

> "(d)(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—
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> * * * * *
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22."

[2] The standards for determining dependency of a "stepchild", which are not germane to the instant action, are provided in 42 U.S.C. § 402(d)(4). Any qualifications as to the general operation of the Act which would be required to accommodate the position of "stepchildren" under it are not considered herein.

class of applicants required to make a showing of support is described in 42 U.S.C. § 416(h)(3)(C)(ii) as the illegitimate child of the insured who does not meet the provisions of either § 416(h)(2) or § 416(h)(3)(C)(i) and who was not living with the insured at the time of his death. It would be fair to say that in a comparison of all the subclasses of illegitimate children defined by § 416(h), the child defined by this last subclass represents that type of illegitimate child with the least factual or legal indicia of legitimacy or commonly recognized family ties to the deceased insured.[3]

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[3] In sum, the statutory classes of children recognized under the Act (excluding "stepchildren") may be broken down, in the following order:

1. legitimate children of deceased insured, § 416(e).
   a. legitimate, biological child
   b. legally adopted child
2. illegitimate child with legal indicia of legitimacy.
   a. by operation of the applicable laws of intestate succession § 416(h)(2)(A).
   b. where the child is born of a seemingly valid marriage invalidated by a non-obvious defect. § 416(h)(2)(B).
   c. where paternity of the child is formally acknowledged by the deceased insured or formally established in judicial procedings before the insured's death. § 416(h)(3)(C)(i).
3. illegitimate child with factual indicia of legitimacy. Where the paternity and parental responsibility of the child are factually demonstrated by the fact that, at the time of death, the father was:

PRIOR PROCEEDINGS

A review of the prior proceedings in this Court demonstrates that the only issue remaining before the Court is to determine whether 42 U.S.C. § 416 (h) (3) (C) (ii) violates the equal protection component of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). *See also Frontiero* v. *Richardson*, 411 U.S. 677, 680 n.5 (1973).

This action first came before a single judge to review, under 42 U.S.C. § 405(g), the Secretary's denial of surviving child's benefits to plaintiffs. In an opinion and order rendered March 2, 1973, the author herein reviewed the record and factual findings made below. Ruling that the Secretary's findings were supported by substantial evidence, the Court accepted as conclusive the following facts. 42 U.S.C. § 405(g). *Lucas* v. *Secretary, Department of Health, Education and Welfare*, C.A. #4845 (D.R.I. 3/2/73) (hereinafter "*Lucas I*"). Robert Cuffee, the deceased insured, lived with plaintiffs' mother, Mrs. Belmira Lucas, from 1948 to 1966. They never married. The two minor plaintiffs, Ruby Marie Lucas and Darin

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a. living with the child, or

b. contributing to the support of the child.
§ 416(h) (3) (C) (ii).

4. illegitimate child. Where only paternity or maternity is factually established, *i.e.*, not eligible under any of the above provisions.

Edward Lucas, were born of this union. However, the Secretary concluded that Cuffee had not acknowledged his paternity in writing, nor had his paternity or support obligations ever been the subject of a judicial proceeding. As a result, the Court concluded the minor plaintiffs did not meet the requirements of 42 U.S.C. § 416(h) (3) (C) (i) (I), (II), or (III), under which plaintiffs' eligibility for the benefits would have been automatic.

The Court next turned its attention to the question of eligibility under § 416(h) (3) (C) (ii). The administrative hearing examiner found, and the Court agreed, that no evidence had been presented to show that Cuffee was living with the plaintiffs at the time of his death. As to the question whether Cuffee had been "contributing to the support of" his children, the minor plaintiffs herein, the Court stated:

> "The term 'contributing to the support of' means regular and substantial support, and is not satisfied by occasional gifts and minor contributions at irregular intervals. *Turley* v. *Cohen*, [325 F.Supp. 1067, 1070 (D.W.Va. 1970)]; *Hupp* v. *Celebrezze*, 220 F.Supp. 463 (N.D. Iowa 1962); *Corey* v. *Social Security Board*, 62 F. Supp. 458 (W.D.Ky. 1945). In reviewing the administrative determination that Cuffee was not contributing to the support of the plaintiffs, this Court must consider whether such a determination is supported by substantial evidence. In *Laws* v. *Celebrezze*, 368 F.2d 640 (4th Cir. 1966), the court defined 'substantial evidence' as

> '. . . evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a scintilla of evidence, but may be somewhat less than a preponderance.'
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> * * * * *
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> In any event, a conclusion that plaintiffs received no support or just occasional irregular support from the insured during the last year of his life is supported by substantial evidence. The fact that this Court might have assessed the evidence and concluded differently is irrelevant. The finding of defendant that Robert Cuffee was neither living with nor contributing to the support of the plaintiffs is affirmed."

Id., slip op. at 8-10.

Although it concluded that plaintiffs were not eligible under § 416(h)(3)(C)(ii), the Court remanded the case for an administrative determination as to whether the plaintiffs were legitimate children under Rhode Island law as the issue of a valid common law marriage. If so, the Court reasoned, each plaintiff would have been entitled to take by intestacy a child's share of the personal property of their father, whose domicile at death was Rhode Island, and would thereby meet the eligibility requirements for benefits under 42 U.S.C. §§ 402(d)(3) and 416(h)(2)(A) despite the fact that plaintiffs had failed to make a satisfactory showing of factual dependence on Cuffee for support at the time of his death. R.I.G.L. §§ 33-1-10, 33-1-1, and 15-8-21 (1956, 1969 Reenactment). *Lucas I*, slip op. at 11-16.

On remand, the Secretary ruled that Belmira Lucas and Robert Cuffee had never entered into a valid common law marriage and that, as a result, their children were not eligible for the benefits sought herein under 42 U.S.C. § 416(h)(2)(A). Pursuant to 42 U.S.C. § 405(g), plaintiffs once again sought reversal of the Secretary's decision, on two grounds: first, they claimed that the Secretary had erred in his assessment of the evidence and applicable Rhode Island law; and second, they claimed that 42 U.S.C. § 416(h)(3)(C)(ii) was unconstitutional because it conditioned plaintiffs' eligibility on proof of actual dependency without requiring a similar showing of legitimate surviving children. Plaintiffs thereupon moved for summary judgment, seeking both to receive the surviving child's benefits denied them and to enjoin application of 42 U.S.C. § 416(h)(3)(C)(ii).

In an opinion and order rendered August 30, 1974, *Lucas* v. *Secretary, Department of Health, Education and Welfare*, C.A. No. 4845 (D.R.I.) (hereinafter "*Lucas II*"), the author herein, sitting as a single judge, affirmed the Secretary's finding that no common law marriage had ever been contracted and that plaintiffs did not meet the eligibility test of 42 U.S.C. § 416(h)(2)(A). As to plaintiffs' second claim, the Court determined that since plaintiffs sought to enjoin the operation of a federal statute and had raised a substantial question as to its constitutionality, a three-judge court was required to determine that issue. 28 U.S.C. §§ 2282, 2284. *Lucas II*, slip op. at 15-16. *See Norton* v. *Richardson*, 352

F.Supp. 596, 598-599 (D.Md. 1972) (hereinafter "*Norton I*"). *See also Maracle* v. *Richardson*, 348 F.Supp. 234 (W.D.N.Y. 1972); *Davis* v. *Richardson*, 342 F.Supp. 588 (D.Conn. 1972), *aff'd*, 409 U.S. 1069 (1972). A three-judge court was thereupon convened. Plaintiffs renewed their motion for summary judgment, but did not reassert their earlier request for an injunction against the enforcement of 42 U.S.C. § 416(h)(3)(C)(ii) generally. In *Flemming* v. *Nestor*, 363 U.S. 603 (1960), the Supreme Court held definitively that a single judge has jurisdiction to hear an action under 42 U.S.C. § 405(g) which, although drawing the constitutionality of a federal statute into question, does "not seek affirmatively to interdict the operation of a statutory scheme." *Id.* at 607-608. *Cf. Davis* v. *Richardson*, *supra* at 589, 593. In view of the great disfavor evinced by the Supreme Court toward unnecessary reference of matters to three-judge courts, *Hagans* v. *Lavine*, 415 U.S. 528, 543-544 (1974), *see also Gonzalez* v. *Automatic Employees Credit Union*, —— U.S. ——, 43 U.S.L.W. 4025 (12/10/74), the Court sought to clarify the apparent ambiguity as to the relief sought. In a letter dated February 5, 1975, counsel for the plaintiffs indicated that a reversal of the Secretary's decision alone was sought. In an order entered February 20, 1975, the three-judge court dissolved itself and remanded the case for determination by a single judge. There being no factual issues in dispute, the matter is ripe for summary judgment. Fed.R.Civ.P. 56.

EQUAL PROTECTION

As is evident from the discussion of the statutory scheme *above*, a claimant seeking surviving child's benefits as the illegitimate child of a deceased insured must meet many more requirements to establish his eligibility than does a legitimate child, who need only establish paternity or maternity, or formal adoption. A simple comparison may be useful. Assuming he meets the age and marital requirements of 42 U.S.C. § 402(d)(1)(B), the legitimate child of a deceased insured need only prove paternity and file for benefits to establish eligibility. A similarly situated illegitimate child, however, must do more than merely prove paternity and file to establish eligibility. He must also show that he could inherit as a child of his father's personalty under the intestacy law of the insured's domicile (42 U.S.C. § 416(h)(2)(A)), or that he was the issue of a marriage invalidated by a non-obvious legal impediment (42 U.S.C. § 416(h)(2)(B)), or that he was formally acknowledged in writing by the insured as his child, or that paternity was established in judicial proceedings before the insured's death (42 U.S.C. § 416(h)(3)(C)(i)), or that the insured, at the time of his death, was either living with claimant or contributing to his support. (42 U.S.C. § 416(h)(3)(C)(ii)). And, of course, if he fails to establish that he meets any of these alternative tests, he will be denied the benefits sought.

Thus, only one subclass of illegitimate children will ultimately be denied surviving child's benefits under

this scheme. But it would be entirely simplistic to view these provisions as merely differentiating between various classes of illegitimates, i.e. those who do in fact establish eligibility versus those who do not. *Contra Jimenez* v. *Richardson*, 353 F.Supp. 1356 (N.D. Ill. 1973), *rev'd sub nom.*, *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). *Cf. Norton* v. *Weinberger*, 364 F.Supp. 1117 (D.Md. 1973), *vacated and remanded*, —— U.S. ——, 94 S.Ct. 3191 (1974) (hereinafter *"Norton II"*). To the contrary, to be eligible all claimants must establish the biological parenthood of the insured. However, additional burdens are imposed strictly on the basis of illegitimacy of birth. In *Frontiero* v. *Richardson*, *supra*, the statutory scheme under attack produced a closely analogous differential in treatment. There, a married male member of the uniformed services was automatically entitled to certain fringe benefits. A married female member of the uniformed services was also entitled to such benefits, but eligibility was also conditioned upon a showing that her husband was actually dependent upon her. As in the case at bar, this additional burden meant that one subclass of married female service people would receive benefits while another subclass (those whose husbands were not factually dependent) would not. Yet the Court had no trouble in recognizing that the challenged statute discriminated on the basis of sex, and not simply be-

tween two classes of women.[4] *See also Jimenez* v. *Weinberger*, *supra*.

Plaintiffs herein claim that the differential treatment embodied in the surviving child provisions of the Act constitutes an invidious discrimination in violation of the Due Process Clause of the Fifth Amendment.

> "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimina-

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[4] Rejecting a similar argument advanced in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Supreme Court, per Justice Powell, stated at 169, 172:

> "The court below sought to distinguish [*Levy* v. *Louisiana*, 391 U.S. 68 (1968)] as involving a statute which absolutely excluded *all* illegitimates from recovery, whereas in the compensation statute in the instant case acknowledged illegitimates may recover equally with legitimate children and 'the unacknowledged illegitimate child is not *denied* a right to recover compensation, he being merely relegated to a less favorable position as are other dependent relatives such as parents . . . .' *Stokes* v. *Aetna Casualty & Surety Co.*, 257 La. 424, 433-434, 242 So.2d 567, 570 (1970).
>
> * * * * *
>
> "We do not think *Levy* can be disposed of by such finely carved distinctions. The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in *Levy*, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged.
>
> * * * * *
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> ". . . It makes no difference that illegitimates are not so absolutely or broadly barred here as in *Levy*; the discrimination remains apparent." (emphasis in original) *See also Davis* v. *Richardson*, *supra*.

tion that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964), quoted in *Frontiero* v. *Richardson*, *supra* at 680, n.5.

A.

In reviewing a federal law challenged as discriminatory, the Supreme Court has adopted those standards of review developed to test the constitutionality of a state statute under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *Frontiero* v. *Richardson, supra; Richardson* v. *Belcher*, 404 U.S. 78 (1971), *Cf. O'Neill* v. *Dent*, 364 F.Supp. 565, 578 (E.D.N.Y. 1973). These standards have traditionally been characterized as a two-tiered approach.[5] Where a classi-

[5] The question whether the Supreme Court has forged a third middle-ground test for certain classifications, coined by one circuit court as "strict rationality", *Berkelman* v. *San Francisco Unified School Dist.*, 501 F.2d 1264, 1269 (9th Cir. 1974), or has revitalized the lower-rung "rational basis" test into a meaningful standard of review, *Women's Liberation Union of R.I.* v. *Israel*, 379 F.Supp. 44, 49 (D.R.I. 1974) and discussion *infra*, is the source of much debate and confusion. *See* Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 21 (1972). *See also, Green* v. *Waterford Board of Education*, 473 F.2d 629; *Norton II, supra; Women's Liberation* v. *Israel*, *supra* at 49-50. Indeed, on the basis of a very recent Supreme Court decision, it might be argued that the higher-rung of the Equal Protection ladder, the "strict scrutiny" test is also being reshaped to the extent that one might speculate as to the future breakdown of the rigid two-tier test and the

fication is based upon "suspect" criteria, *Graham* v. *Richardson*, 403 U.S. 365 (1971), or impinges upon a "fundamental" interest, *Shapiro* v. *Thompson*, 394 U.S. 618 (1968), it will be subjected to strict judicial scrutiny and declared invalid unless it is narrowly tailored to fulfill a compelling governmental interest. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974). Other classifications will be subjected to a less demanding test to determine if they "rest upon some ground of difference having a fair and substantial relation to the object of the legislation," *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920), quoted in *Reed* v. *Reed*, 404 U.S. 71, 76 (1971). This Court had occasion to consider the proper scope of review under the so-called "rational basis" test in *Women's Liberation Union of Rhode Island, Inc.* v. *Israel*, 379 F.Supp. 44, 49-50 (D.R.I. 1974):

> "A review of recent Supreme Court decisions indicates that the highly deferential 'rational basis' test applied by the Court in the 1960's is being reshaped into a meaningful standard of review. The nature of the inquiry under this

emergence of a more fluid, sliding-scale approach to all equal protection challenges. *See Sosna* v. *Iorva*, —— U.S. ——, 43 U.S.L.W. 4125, 4133 (1975) (Marshall, J., dissenting). *See also Weber, supra* at 173 (majority opinion) and 181 (Rehnquist, J., dissenting). *Cf. San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting), *Chicago Police Department* v. *Mosley*, 408 U.S. 92 (1972). *See generally* Gunther, The Supreme Court, 1971 Term, *supra* at 17-18.

'invigorated' test has been variously expressed but certain salient features have emerged. First, the Court will not speculate as to unexpressed permissible state interests which may rationally be furthered by a challenged classification, but will confine its inquiry to articulated or obvious objectives. *LaFleur*, [*Board of Education* v. *LaFleur*, 414 U.S. 632 (1974)] (Powell, J., concurring); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973); Green v. Waterford Board of Ed., *supra*. Second, the Court will not accept factually unsupported assumptions to demonstrate the reasonableness of a challenged classification. U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 535, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). . . . Third, The Court in a number of instances has abandoned the highly deferential formulation of the "rational basis" test, such as that expressed in McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961), that a classification must be sustained "if any state of facts reasonably may be conceived to justify it" and now demands that the classification bear a substantial or significant relation to the objective it is claimed to further. *Reed*, *supra* 404 U.S. at 75-76, 92 S.Ct. 251." (footnote omitted).

The first question before us, then, is to determine the appropriate standard of review. Plaintiffs urge that we hold classifications based on legitimacy of birth to be "suspect" and subject the challenged provision to strict judicial scrutiny. They refer us to the majority opinion in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) (hereinafter "*Rodriguez*"), wherein the Court, per Justice Powell, enumerated the "traditional indicia of suspectness" thusly:

> "[T]he class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

The Supreme Court's own statements in a succession of cases requiring equality of treatment for illegitimate children [6] demonstrate that the immutable trait of illegitimacy bears all the "traditional indicia of suspectness" set forth in *Rodriguez*, *supra*. In

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[6] With only one exception, the Court in recent years has consistenly struck down statutes as denying equal protection of the laws, where the classification was based on illegitimacy of birth. *See Jimenez* v. *Weinberger*, 417 U.S. 628, 94 S.Ct. 2496 (1974); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *Weber*, *supra*; *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (1968). *But see Labine* v. *Vincent*, 401 U.S. 532 (1971). The continued vitality of *Labine*, a 5-4 decision rendered before Justices Powell and Rehnquist were appointed to the Court, is somewhat open to doubt. Since *Labine* was decided in 1971, Justice Stewart, who joined the majority opinion therein, has stated that illegitimacy, "at least in some settings", is a suspect classification. *Rodriguez*, *supra* at 61. *But see Eskra* v. *Morton*, 380 F.Supp. 205, 214, 219 (W.D.Wis. 1974). Be that as it may, *Labine* is clearly distinguishable from the instant case for the reasons stated in *Davis* v. *Richardson*, *supra* at 592. *See* also *Weber*, *supra* at 170. *Cf. Miller* v. *Laird*, 349 F.Supp. 1034, 1041 (D.D.C. 1972).

Rodriguez, Justice Marshall commented on the second-class status of illegitimate children:

> "Status of birth, like the color of one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations. Yet illegitimacy has long been stigmatized by our society." *Id.* at 109 (dissenting opinion).

In asking the question "[w]hy should the illegitimate child be denied rights merely because of his birth out of wedlock?", *Levy* v. *Louisiana*, 391 U.S. 68, 71 (1968), the Court found it necessary to proclaim:

> "We start from the premise that illegitimate children are not 'non-persons'. They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 70 (footnotes omitted).

Similarly in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (hereinafter "*Weber*"), the Court explained the need for judicial sensitivity and solicitude to classifications which disadvantage illegitimates:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. *Id.* at 175-176 (footnote omitted).

The standard of review applied in *Weber* is far from clear. The Court first makes reference to the minimum equal protection requirement "that a statutory classification bear some rational relationship to a legitimate state purpose". *Id.* at 172 (citations omitted). The Court then states, however:

> "Though the latitude given state economic and social regulation is necessarily broad, *when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"
>
> *Id.* at 172-173 (emphasis added). *See* note 5, *supra*.

And only a few short paragraphs later, the Court rejects the state interest therein advanced as "not compelling". *Id.* at 173. *Cf. Miller* v. *Laird*, 349 F. Supp. 1034, 1046 (D.D.C. 1972). Equally unclear is the standard of review applied by the Court in its per curiam decision in *Gomez* v. *Perez*, 409 U.S. 535 (1973), wherein the Court, after reviewing its decisions in *Levy* v. *Louisiana*, *supra*, and *Weber*, *supra*, simply stated:

> "Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that *once a State posits a judicially enforceable right on behalf of children* to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother." *Gomez* v. *Perez*, *supra* at 538 (emphasis added).

See generally Eskra v. *Morton*, 380 F.Supp. 205, 216-217 and n. 13 (W.D.Wis. 1974).

In view of the foregoing discussion and the frequency with which illegitimate children have been required to turn to the courts to seek equality of treatment,[7] this Court is propelled to the conclusion

[7] *See* n.6 *supra*. For lower court opinions, *see, e.g., Beaty* v. *Weinberger*, 478 F.2d 300 (5th Cir. 1973) *aff'd*, —— U.S. ——, 94 S.Ct. 3190 (1974); *Watts* v. *Veneman*, 476 F.2d 529 (D.C.Cir. 1973), *aff'g*, 334 F.Supp. 482 (D.D.C. 1971); *Norton II*, *supra*; *Severance* v. *Weinberger*, 362 F.Supp. 1348 (D.D.C. 1973); *Miller* v. *Laird*, *supra* at 1046 and n.107; *Maracle* v.

that illegitimacy should be treated as a "suspect" classification. *See Eskra* v. *Morton*, *supra* at 215. However, the Court is guided by the recent Supreme Court decision of *Jimenez* v. *Weinberger*, *supra* at 631-632, 636, to refrain from reaching such a conclusion if the challenged classification cannot withstand a review under the less stringent "rational basis" test[8] *Cf. Women's Liberation* v. *Israel*, *supra* at 49. We must therefore turn to that question first.

Richardson, supra; Griffin v. *Richardson*, 346 F.Supp. 1226 (D.Md. 1972), *aff'd without opinion*, 409 U.S. 1069; *Davis* v. *Richardson*, *supra*.

[8] Although the foregoing analysis and conclusion must ultimately be characterized as *obiter dictum*, the Court believes that an extended discussion of the propriety of labelling illegitimacy as "suspect" was warranted in this case in view of the "close question" presented under the "rational basis" test. *Compare Adams* v. *Weinberger*, No. 73-C-633, unreported op. (E.D.N.Y. 11/25/74), and *Norton II*, *supra*, each rejecting a constitutional challenge identical to the one at bar. As discussed *infra*, the provisions under attack at first glance appear to overcome the deficiencies deemed fatal by the Supreme Court in *Jimenez* v. *Weinberger*, *supra*. As decisional law on the status of illegitimate children increases and as legislators grow more sensitive to constitutional demands in this area, we see laws enacted, as in the case at bar, which increasingly approach all that is constitutionally required to survive review under the "rational basis" test. If the constitutional threshold of the "rational basis" test had been met, this Court has no doubt that review under the "strict scrutiny" test would have been appropriate and would prove fatal to the challenged classification. However, for reasons which follow, the Court concludes that the statutory scheme does not quite reach that threshold.

B.

Keeping in mind the principles outlined *ante* at ——, slip. op. at 15-16, we must begin our inquiry with an analysis of *Jimenez* v. *Weinberger*, *supra*, the latest Supreme Court decision in this area. Plaintiffs in *Jimenez* were two illegitimate children of Ramon Jimenez, a disabled wage-earner covered by the Social Security Act. Since they were born after the onset of their father's disability, they were ineligible to receive child's insurance benefits. Had they been legitimate, or "legitimated" within the meaning of 42 U.S.C. § 416(h)(2), plaintiffs would have been entitled to the benefits, despite the fact that they were born after Mr. Jimenez's disability occurred.

To support this discrimination, the Secretary there, as in the case at bar, claimed that it was designed to prevent spurious claims. Although acknowledging that the prevention of spurious claims was indeed a legitimate governmental interest, the Court concluded that the challenged classification was not reasonably related to that purpose or the purposes of the Act in general. The Court based its conclusions on the fact that the classification was both "under-inclusive," "in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent" and "over-inclusive," "in that it benefits some children . . . who are not dependent on their disabled parent." *Id.* at 637. *Cf.* Tussman and tenBroek, "The Equal Protection of the Laws," 37 Calif.L.Rev. 341 (1949). The Court

reasoned that it could not serve the purpose of preventing spurious claims to deny benefits to some children who were in fact dependent nor to grant benefits to some who were in fact not dependent. Addressing itself to plaintiffs' particular situation, the Court remanded the case to give them an opportunity to establish factual dependency. *Jimenez*, *supra* at 636-638. In so doing, the Court in effect eliminated the "under-inclusive" aspect of the statute.

The statute before this Court is *not* "under-inclusive." Section 416(h)(3)(C)(ii) provided plaintiffs an opportunity to demonstrate their factual dependency. They were unable to do so. However, an analysis of the statutory scheme reveals that it is nonetheless "over-inclusive" in that some of the "children" conclusively presumed dependent by 42 U.S.C. § 402(d)(3) are not, thereby refuting the claim that the classification is designed to prevent spurious claims.[9] The Secretary virtually concedes as much by arguing:

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[9] With all due respect to the court ruling in *Norton II*, *supra*, this Court will not engage in far-reaching speculations as to the degree of correlation between the various subclasses of illegitimates and parental support, absent any statistical bases. *Id.* at 1128. *Accord Miller* v. *Laird*, *supra* at 1044. *See Jimenez* v. *Weinberger*, *supra* at 636-637. The facts of the instant case suggest that the presumptions made in support of the instant classification are too facile. Here plaintiffs' mother and Robert Cuffee lived together and shared expenses for 18 years, during which time the plaintiffs were born. For the last two years of his life, Cuffee lived with his mother and contributed to his children's support on an infrequent basis. Although it is undisputed that plaintiffs are Cuffee's children, they are nonetheless rendered ineligible by 42 U.S.C. § 416(h)

> "Under the Social Security Act the marriage of the child's parent is a significant act that establishes dependency or *the right to support.* Where no marriage exists it is rational and equitable for Congress to require some other significant act in order to establish *the right of the child to support* from the parent on whose account benefits are claimed." Brief of Defendant in Response to Brief of Amicus Curiae, pp. 2-3 (emphasis added).

The Secretary's argument boils down to this: Congress' intention in delineating who is eligible for child's insurance benefits was not to provide a source of income to *replace* one *actually* lost, but to provide a source of income to those who, based on society's views of parental obligations, *ought* to receive support, whether they had in fact received it or not. The key to the Secretary's argument, as quoted above, is the child's "right to support". The Secretary argues that Congress could and did conclude that it could parcel out benefits on the basis of a parent's greater *obligations* to the offspring of a marriage than to "those which he owes to the offspring of a casual liaison." [10] Defendant's Brief, *supra* at 1. *Cf.*

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(3) (C) (ii) simply because *at the time* of Cuffee's death, he was no longer part of the family unit. It takes little imagination to postulate the situation where, after several years of a marriage, there is a separation and one spouse leaves the home. Like Cuffee, that spouse does not in fact contribute to his or her children's support. Yet upon that spouse's death, the children are automatically entitled to surviving child's benefits if the parent was covered by the Act.

[10] Though the Secretary raises this argument here, one can hardly term an 18-year union a "casual liaison".

Norton II, supra at 1127, n.6. Thus, once again we are confronted with a legislative enactment which visits "society's condemnation of irresponsible liaisons beyond the bonds of marriage" on the head of the child who is in no way responsible for the circumstances of his birth. *Weber, supra* at 175. The statutory scheme unquestionably does further the interest recited by the Secretary. It conditions eligibility on the basis of Congress' views as to who is entitled to support and reflects society's view that legitimate and "legitimated" children are more entitled to support by or through a parent than are illegitimate children. But this is *not* a legitimate governmental interest, and thus cannot support the challenged classification. *Gomez* v. *Perez, supra.* The Secretary has failed to assert any other government interest to support this classification. Therefore his denial of benefits to the plaintiffs is reversed.

In concluding that 42 U.S.C. § 416(h)(3)(C)(ii) is unconstitutional insofar as it restricts eligibility to those children whose fathers were contributing to their support at death, the Court would point out that the government's legitimate interest in preventing spurious claims is not undermined.[11] The initial

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[11] Obviously, today's ruling, if it were to be enforced generally, confers eligibility on some illegitimate children, not previously eligible, who were not in fact dependent on the deceased insured. Yet the Court cannot agree with the conclusion reached by the district court in *Norton II, supra* at 1129, n.8, that such a ruling would "alter the purpose, scope or *operation* of the statute in a way the legislature never intended." (emphasis added) (citations omitted). The *Norton*

burden of establishing biological parenthood may prove insurmountable in many cases where the deceased insured and purported father had never formally acknowledged paternity, and was neither living with the child nor contributing to his support. *See Miller* v. *Laird, supra* at 1044 and n.95. *Cf. Gomez* v. *Perez, supra* at 538; *Weber, supra* at 175.

The Court recognizes that the remand in *Jimenez* v. *Weinberger, supra,* on the issue of factual dependency appears to argue against the conclusion reached today. However, two considerations lead this Court to the opposite conclusion. First, on the record before the Supreme Court in *Jimenez,* there was no question that the plaintiffs therein were in fact dependent upon their disabled father. Thus, a ruling narrowly tailored to provide them an opportunity to demonstrate dependency would eliminate the injury and, it may be argued, their standing to challenge the "under-inclusiveness" of the provision as it related to illegitimate children deemed ineligible for failure to demonstrate dependency. *See Broadrick* v. *Oklahoma,* 413 U.S. 601, 610-611 (1973). *Cf. Frontiero* v. *Richardson, supra,* especially at 691 (concur-

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II court reached this conclusion on the premise that the Act's benefits are conferred only on those children who are actually dependent. This Court, like the Supreme Court in *Jimenez, supra,* decided after *Norton II,* has determined that the Act already operates to qualify some children who are not in fact dependent. Thus this decision would merely expand the class of eligible children, without substantially altering the operation of the Act.

Cf. Norton II, supra at 1127, n.6.

ring opinions of Stewart, J. and Powell, J.). Second, if this were not so, it is difficult to divine the reason behind the Supreme Court's vacation and remand of *Norton II, supra,* a challenge identical to plaintiffs' herein, for reconsideration in light of its ruling in *Jimenez.*[12]

Enter order accordingly.

/s/ Raymond J. Pettine
Chief Judge

February 25, 1975

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[12] The remand may be limited to the fact that the district court in *Norton II* placed some reliance on the lower court decision in *Jimenez* v. *Richardson, supra,* subsequently reversed by the Supreme Court. As the Court itself noted, in a slightly different context, "[a]s frequently occurs in the case of summary affirmance, [the basis for] the decision . . . is somewhat opaque." *Gibson* v. *Berryhill,* 411 U.S. 564, 576 (1973). *Norton II* is presently being reconsidered by the three-judge district court in the District of Maryland.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 4845

RUBY M. LUCAS and DARIN E. LUCAS, infant minors, by their mother and next friend, BELMIRA LUCAS

vs.

SECRETARY, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA

ORDER

The above cause came to be heard on Motion for Summary Judgment by Chief Justice Raymond J. Pettine and after submission of Memoranda of Law and the rendering of a written decision on or about February 25, 1975, it was ORDERED, ADJUDGED and DECREED:

1. Plaintiff's Motion for Summary Judgment is granted.

2. The Administrative Decision of the Department of Health, Education & Welfare for the United States of America declaring Ruby M. Lucas and Darin E. Lucas ineligible for surviving child's benefits under the Social Security Act as children of a deceased wage earner, Robert Cuffee, Social Security No. 039-12-1375, is reversed.

3. The Secretary of the Department of Health, Education & Welfare be and he is hereby ordered to

pay Social Security benefits for said minor children of the deceased wage earner in accordance with the Social Security Act.

4. Plaintiffs are awarded the full benefits in accordance with the Social Security Act.

5. Defendant shall pay, from the total award, Twenty-Five Per Cent (25%) of the past due benefits, as fees, to plaintiffs' counsel, Thomas W. Pearlman, it representing an agreed contingency fee and the Court finds this to be a fair and reasonable fee for work done.

BY ORDER:

/s/ Frederick R. DeCesaris
Clerk

ENTER:

/s/ Raymond J. Pettine
Chief Judge
3/21/75

APPENDIX C

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4845

RUBY M. LUCAS and DARIN E. LUCAS, infant minors, by their mother and next friend, BELMIRA LUCAS

vs.

SECRETARY, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to Title 28, United States Code, Sections 1252 and 2101, from the judgment of the District Court entered in this action on March 21, 1975.

Dated at Providence, Rhode Island, this 15th day of April, 1975.

SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, UNITED STATES OF AMERICA

By his Attorneys,

/s/ Lincoln C. Almond
LINCOLN C. ALMOND
United States Attorney

/s/ Everett C. Sammartino
EVERETT C. SAMMARTINO
Assistant U. S. Attorney

APPENDIX D

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 202(d)(1) and (3) of the Social Security Act, 42 U.S.C. 402(d)(1) and (3), provide in pertinent part:

> (d)(1) Every child (as defined in section 416 (e) of this title) of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 18, and
>
> (C) was dependent upon such individual—
>
> (i) if such individual is living, at the time such application was filed,
>
> (ii) if such individual has died, at the time of such death, or
>
> (iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died)

until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

* * * * *

(d)(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

Section 216(h)(3) of the Social Security Act, 42 U.S.C. 416(h)(3), provides in pertinent part:

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

* * * * *

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

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APPENDIX

Supreme Court, U. S.
FILED
DEC 1 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-88

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant

—*v.*—

RUBY M. LUCAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

JURISDICTIONAL STATEMENT FILED JULY 14, 1975
PROBABLE JURISDICTION NOTED OCTOBER 6, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-88

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant

—*v.*—

RUBY M. LUCAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

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RELEVANT DOCKET ENTRIES

Complaint (Filed February 8, 1972)

Summons (Entered February 8, 1972)

Pltff's Interrogatories to Deft. (Filed March 31, 1972)

Deft's Motion for Enlargement of time and granted (Filed March 31, 1972)

Answer of Deft. (Filed May 31, 1972)

Preliminary Pre-Trial Order (Entered September 1, 1972)

Pltff's Motion for Extension (October 15, 1972)

Order Granting Pltff's Motion for Extension (Entered October 16, 1972)

Deft's Motion for Summary Judgment (Filed February 8, 1973)

Pltff's Motion for Summary Judgment (Filed February 22, 1973)

Opinion and Order of March 2, 1973 (Entered March 9, 1973)

Order of Chief Judge Pettine remanding to Sec. of HEW (Entered March 9, 1973)

Order of Chief Judge Pettine placing case on Inactive list (Dated March 15, 1973)

Pltff's Petition for Extension of time for further findings of fact (Filed May 25, 1973)

Appearance of Samuel C. Fish and Lawrence E. Burstein (Entered September 4, 1973)

Pltff's Motion for Summary Judgment (Filed July 26, 1974)

Deft's Motion for Summary Judgment (Filed August 13, 1974)

Affidavit of Everett Sammartino (Filed August 13, 1974)

Memorandum and Order of August 30, 1974 for three-judge court

Assignment of Three-Judge Court (Dated September 3, 1974)

PRELIMINARY Pre-Trial Order (Dated September 27, 1974)

Pltff's Motion for Summary Judgment (Filed November 1, 1974)

Dft's Objection to motion for Summary Judgment (Filed November 12, 1974)

Letter from Thomas Pearlman to Judge Pettine requesting that case be tried by one judge (Dated February 5, 1975)

Memorandum of Feb. 20, 1975 remanded back to Judge Pettine

Opinion of Single-Judge District Court of February 25, 1975

Addendum to Opinion (Filed March 17, 1975)

Order of March 21, 1975 granting Pltff's Motion for Summary Judgment

Deft's Notice of Appeal to Supreme Court dated April 15, 1975

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 4845

RUBY M. LUCAS AND DARIN E. LUCAS, infant minors, by their mother and next friend, BELMIRA LUCAS

vs

SECRETARY, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE UNITED STATES OF AMERICA

COMPLAINT

COUNT I

1. The Plaintiffs, RUBY M. LUCAS and DARIN E. LUCAS, are infant minors and are children of their mother and next friend, BELMIRA LUCAS and all are citizens and residents of the City of Providence, State of Rhode Island.

2. The Defendant is the Secretary of the Department of Health, Education and Welfare of the United States of America.

3. This action is brought pursuant to the provisions of Section 205(g) of the Social Security Act, 42 U.S.C. 405(g) to obtain a court review of the final decision of a Hearing Examiner's decision and the decision of the Appeal's Council which decision stands as the final action of the Secretary of Health, Education and Welfare finding that the plaintiffs are not entitled to dependency insurance benefits under the Act as the children of deceased wage earner.

4. Plaintiffs are minor children of the wage earner, Robert E. Cuffie, social security number 039-12-1375.

5. On October 24, 1968, the plaintiffs filed for surviving children's insurance benefits as children of the deceased wage earner Robert E. Cuffie who died June 18, 1968.

6. The application was denied on September 13, 1969, the denial was affirmed on August 31, 1970, and the applicant appealed to the Hearing Examiner.

7. On January 5, 1972, the Appeal's Council affirmed the denial of the hearings examiner.

8. Plaintiffs through their mother and next friend showed overwhelming evidence they were entitled to benefits under the Act.

9. The findings of the Secretary, as above set forth, are not supported by substantial evidence, are in error on a number of important and substantial respects, and upon review of this Honorable Court of the record and the available, credible evidence, the plaintiffs are entitled to the dependency benefits under the Act in that among other things the plaintiffs allege and will prove that:

a) infant children should not be deprived of their social security dependency benefits by reason of:

1. neglect of their natural
2. disability of their natural father

b) the infant children are in fact the result of a common law marriage and should not be deprived of their dependency benefits by reason of alleged illegitimacy.

c) even if said children were deemed illegitimate they should not be deprived of their social security dependency benefits.

d) as the acknowledged children of the deceased wage earner no credible evidence was presented to deprive the infant children of their benefits.

e) Such other and further grounds as the court deems just to prevent these infant minor children from being deprived of their social security dependency benefits.

WHEREFORE, plaintiffs respectfully request a review and a judgment reversing the decision of the Secretary and the entry of a finding establishing his right to these additional benefits and recommitting the matter to the Secretary for computation of the additional benefits to which they are entitled.

By their attorneys,
PEARLMAN & PEARLMAN

BY /s/ T. W. Pearlman
705 Industrial Bank Building
Providence, Rhode Island 02903
421-4343

Trial by jury claimed.

[55] (The following is a transcript of the hearing held before George V. Flavin, a Hearing Examiner of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare on March 24, 1971, at Providence, Rhode Island, in the case of Belmira Lucas, Claimant, for Ruby M. Lucas and Darin E. Lucas, Robert E. Cuffee, wage earner, Social Security Account Number 039-12-1375. The claimant, Belmira Lucas, appeared and testified.)

(The hearing commenced at 10:55 a.m., on March 24, 1971)

OPENING STATEMENT BY HEARING EXAMINER:

HEARING EXAMINER: This is a hearing in the matter of Belmira Lucas, a claimant for Child's Insurance Benefits on behalf of Ruby M. Lucas, and Darin E. Lucas, based on the earnings record of Robert E. Cuffee, Social Security Account Number 039-12-1375. It is Mrs. Lucas, is it?

CLAIMANT: Yes.

EXAMINER: You are represented by an attorney this morning, are you not?

CLAIMANT: Yes. (Nodding)

EXAMINER: You are represented by an attorney this morning, are you not, Mrs. Lucas?

CLAIMANT: Yes, I am.

EXAMINER: And for the record would you state your attorney's name?

CLAIMANT: Thomas W. Pearlman.

EXAMINER: And Mr. Pearlman, for the record would you state your full name and your business address, please, if you will.

ATTORNEY: Yes. My name is Thomas W. Pearlman, I am senior partner in the law firm of Pearlman & Pearlman, I'm located at 705 Industrial Bank Building, Providence, R.I., Room 2903.

[56] EXAMINER: Thank you. Mrs. Lucas, the purpose of this hearing is to make certain as you as a claimant who has had an unfavorable determination now has an opportunity to present your case to somebody who has had no previous part in the case. For your information I do not represent nor am I an employee of the office which has previously denied your claim. I will make a new and independent record based on the—decision based on the record that we make here today. Now that record is going to consist of your testimony and that of any other witnesses as well as certain papers which are received into evidence. Included among these papers will be some that were obtained by the office which did previously handle your case. I want you to feel at ease here today because we're not going to follow any great formality. We'll be formal only to the extent that your testimony will be under oath and this young lady is going to make a word by word record of what happens here today. Now bearing that in mind when you answer my questions or the questions of your attorney will you please keep your voice up so she can hear you?

CLAIMANT: Yes. (Nodding)

EXAMINER: Will you do that for us?

CLAIMANT: I'll try.

EXAMINER: Fine. Now my first knowledge of this case came after you filed a request for a hearing and at that time I had the other office send me its complete file. After examining that file I have selected [57] certain papers which appeared important for this record. These papers have been numbered and Mr. Pearlman, have you had an opportunity to look them over this morning?

ATTORNEY: Yes, I have.

EXAMINER: Do you have any objection to any of them being admitted into the record?

ATTORNEY: No, I do not.

EXAMINER: All right, there being no objection the list of proposed exhibits will be accepted into evidence and marked as exhibits numbered one through twenty-six. Do you have any other written evidence you would like to submit to me this morning, Mr. Pearlman?

ATTORNEY: Well it may be redundant but I do have a statement from the Lying-In Hospital records office.

EXAMINER: All right, why don't we—

ATTORNEY: Which I might submit, and there may be some other documents.

EXAMINER: Will you let me know if you desire to submit some further information—all right? Let the record show that the one-page document from the Providence Lying-In Hospital dated March 24, 1971, will be accepted into evidence and marked as Exhibit Number 27.

ATTORNEY: Thank you.

EXAMINER: Now, Mrs. Lucas, I'm going to recite my understanding of what has happened in your case up until today. Would you listen to this and tell me if I'm correct. You filed an application on October 24, 1968 [58] for Children's Insurance Benefits on behalf of Ruby Lucas and Darin Lucas, based on the earnings account of Robert E. Cuffee, Social Security Account Number 039-12-1375. You were notified by a letter that it had been determined that the children did not have the necessary relationship of Mr. Cuffee to qualify for benefits on his account and you then requested reconsideration and you were notified on reconsideration the initial determination had been affirmed and it was subsequent to that that you requested a hearing, is that correct?

CLAIMANT: Yes. (Nodding)

EXAMINER: All right. Now the issue to be determined by me is whether Ruby Lucas and Darin Lucas are entitled to Children's Insurance Benefits based on the earnings record of Robert Cuffee and in turn this issue is dependent upon specific findings as to whether Ruby Lucas and Darin Lucas are the children of Robert E. Cuffee, as defined in Section 216(e) of the Social Security Act, as amended. Would you stand up for me, please.

The claimant, Belmira Lucas, having been first duly sworn testified as follows:

EXAMINATION BY HEARING EXAMINER

Q All right, would you sit down and tell us your full name and your address, would you please?

A Belmira Lucas, 142 Dodge Street, Providence, Rhode Island, Code 02907.

[59] Q And, Mrs. Lucas, were you ever married to Robert E. Cuffee?

A No, I was not.

Q You were never legally married?

A No.

Q But you did live with him?

A Yeah, I lived with him.

Q What years did you live with him?

A I lived with him from 1946 up to 1968.

Q Nineteen—

A Well 1968.

Q Sixty-eight?

A Yes.

Q And during that period of time were there some children born of your relationship with Mr. Cuffee?

A Yes there was.

Q And who are these children?

A Ruby Marie and Darin Edward.

Q Can you give me their dates of birth?

A Ruby Marie was born on the 7th of February 1953—Darin was born October 28, 1960.

Q All right. Now whether or not your husband, Mr. Cuffee, ever acknowledged these children as being his children in writing, do you know whether he ever acknowledged in writing?

[60] No he has never acknowledged it in writing.

Q But as I understand it, and correct me if I'm wrong, during the time that you lived together he treated them as his children and he supported them?

A Oh, definitely so.

Q Now at some time did your husband leave the household where you and the children were living?

A Do you mean did we break up?

Q Yes.

A Oh, well, towards the end—towards the end we were see-sawing back and forth.

Q Uh huh.

A And that was after the children were born.

Q I understand that.

A Yes.

Q Well I say some time did he leave in the summer of—

A Yes

Q Now where did he live out?

A In—

Q Can you tell me approximately when he left the house that you and your children lived in and went to live with his mother?

A Well he went to live with his mother of the New Year of Sixty-eight, he left and went to live with his mother.

Q In the early part of 1968?

[61] A Sixty-eight.

Q When did he die, Mrs. Lucas?

A He died I think it was—let me see, the dates I'm not too good at.

Q That's all right, you can refresh your recollection—

A I'll have to retract that. He left and went to live with his mother—he's been dead now either two or three years. Two years prior to his death is when we separated, so that would be—

Q Three years prior to his death?

A Two or three years prior to his death is when we separated.

Q I see.

A So that would be I'd say, Sixty—Sixty-six, Sixty-seven.

Q All right. He died in 1968?

A Right.

Q Pardon me.

A June of Sixty-eight.

Q All right. Now during the time that he lived with his mother and lived apart from you and the children did he contribute to the support of the children.

A He certainly did.

Q And can you tell me how much or approximately how much, and how did he contribute? What I mean by that is did he pay you in cash?

A Yes he did. He did not pay me—he did not give it to me directly.

Q Who did he give it to?

[62] A But he'd give it to his daughter.

Q Who is?

A Ruby. He would give her if he seen her, say like on Monday, he would give her ten or fifteen dollars. If he seen her on toward the end of the week he'd give her another ten or five or whatever may be.

Q I see.

A It would average on the space of twenty-five or thirty dollars a week.

Q Well I assume that she then would tell you whether she received money from her father.

A Yes she would.

Q So that as you tell me, that he never made any payment direct to you?

A Direct to me, no. He sent it—

Q Would he give this money to his daughter and tell her to see that it was used for—

A For the daily use.

Q For the use of his two children?

A Yes.

Q Well, now, what bothers me just a little bit, Mrs. Lucas, in this record that we have in front of us is that there is some conflicting evidence. Apparently his mother in certain instruments which she has filed with the Social Security Administration indicates that for a number of [63] years her son didn't work.

A No he didn't.

Q And that she contributed to his support.

A She certainly did.

Q And she apparently has no records and no memory as to how much she contributed to him. What puzzles me a little bit is where he would be getting the money to contribute regularly to the support of his children.

A From his mother.

Q From his mother?

A From his mother. She has always—he even when he worked, even when we were together she still kept him with money.

Q She kept him supplied with money?

A She worked for no one but Robert.

Q Was he her only child?

A The only child.

Q Have you talked with her about her memory as to how much he had contributed?

A Yes, I am sorry—I told my attorney, Mr. Pearlman, I'm sorry that my daughter had destroyed it because when I first got the letter saying that it was not granted I went to her—unbeknown to her mother I had it tape recorded and I asked her why did she do it?

Q Uh huh.

A It all seemed to bear out to one thing—you do not have him, I don't have him and you shall have no—

Q I see. So it's a personal thing.

[64] A It's a personal thing.

Q I understand. Now there's some information in the file or some indication in the file that in the same household with the mother, with his mother and himself his aunt lived.

A Aunt. Yes (nodding)

Q Now do you have any information relative to whether or not she contributed at all to his support?

A Yes she did.

Q Well, again, from the information which is in the file it appears that she has said that she has no recollection or no information of any money that she did give to her nephew.

A But she did.

Q She did contribute to him?

A Mostly.

Q Now, Mrs. Lucas, during the last, let's say last year that your husband lived, that Mr. Cuffee lived, do you know whether he actually did any work himself or not?

A No, in the last years, I'd say in the last year to two he was unable to.

Q He wasn't able to work?
A He wasn't able.
Q I see. So that if I understand your allegation then, it is then that he contributed to his daughter—to the support of his daughter and his son, and he did this quite regularly?
[65] A Regularly.
Q And so far as you know the money he received and to enable him to do this, was received from his mother.
A His mother and his aunt.
Q And that his mother is blocking, or not say blocking, is reluctant to give information because she didn't want to be helpful to you at all?
A That's right.
Q I don't have any other questions, Mr. Pearlman, is there something else you'd like to bring out from his lady?
ATTORNEY: Yes, I'd like to clarify just a couple of things which I think might be helpful. Mrs. Lucas, the aunt of the late Robert Cuffee, who lives with Robert Cuffee's mother, that's Madeline Cuffee's—what is her name?
A Hazel Cuffee.
Q And Hazel Cuffee always worked. Is that right?
A Oh, yes.
Q And isn't it a fact that Hazel Cuffee with her money that she earned working would pay all the household expenses?
A Oh, yes, she—
Q Of Madeline Cuffee and Hazel Cuffee and Robert Cuffee when he was home?
A Oh, yes, everything.
[66] Q So that the money that Robert Cuffee's mother earned was all given to Robert?
A It was all Robert's more than any one thing else.
Q Mrs. Madeline Cuffee had no expense of her own because all the household expenses were paid for by the aunt.
A I'll put it this way—all her household expenses were in her name but Hazel Cuffee upheld the expenses.

Q I see. Now, isn't it a fact you told me on one occasion that you know of and there may have been more, that Robert Cuffee filed an Internal Revenue Tax Return?
A Oh, yes, he did.
Q Where he named the children as dependents?
A Yes, only Ruby was born at the time and he claimed Ruby but was unable to claim her so he had to pay that money back.
Q Have you been able to find any return record of that tax return?
A No, I haven't.
Q Now in the file here there is an exhibit—number sixteen, which appears to be a record of the funeral of the late Robert E. Cuffee.
A Yes.
Q And names as his two children, Ruby Marie and Darin Edward—
A Yes.
Q Are those the same two children for whom you are asking for support?
A Yes.
[67] A Through the Social Security?
Q Now who arranged for this funeral?
A His mother arranged for the funeral.
Q And you didn't give this information—
A His mother and Lloyd Carl.
Q Lloyd Carl is the mother's—
A He's deceased.
Q He's deceased now but he was the brother—
A No he wasn't his brother.
Q Wait a minute—he was the brother of Madeline Cuffee?
A No he wasn't, he was Madeline Cuffee's nephew, but due to his age we always called him Uncle Lewey.
Q I see.
A He wasn't her brother, he was her nephew.
Q And is it your belief and understanding that the information concerning these two children, which appears in Exhibit 16, was furnished by Robert Cuffee's mother and so-called Uncle?
A Lloyd Carleton.

Q Lloyd Carleton?
A Yes. I had no part in the funeral arrangements at all.
Q Now did you go to the funeral?
A Yes I did.
Q Did the two children go to the funeral?
A All the children went.
Q And do the two children, Ruby and Darin, visit the grave often?
A They're always at the grave because it's so close by.
Q All right. Now during Robert Cuffee's lifetime did he give any presents to the two children in question, Ruby and Darin?
A Well he gave them everything that they wanted—birthdays and Christmas he would get my daughter—he would give my daughter the money and let her go down and she would pick out what she felt the children needed.
Q And could you tell this honorable body how he names—the names were chosen for these two children when they were born?
A Well they were chosen by—the first names was chosen by the godmother, the second name was chosen by the father. Edward represented Robert's middle name, Marie represented my mother's name and she wanted to have it.
Q And did Mr. Cuffee take you to the Lying-in Hospital in both cases?
A Yes he did.
Q Did he visit you every night?
A He was a steady visitor.
Q Did he buy things for the children?
A Oh, yes.
Q Now did the children refer to him as Daddy during their lifetime?
[69] A Yes.
Q And did he refer to the children as son—his son and his daughter?
A Oh, yes.
Q Now this Mr. Carl, Lloyd Carl is no relation to you, is he?
A Oh no, he isn't.

Q And when he signed a statement that he was—signed Bobby—Exhibit number twenty-one, dated January 27, 1969, where he indicated that Darin and Ruby Lucas were the children of Robert Cuffee, he did that on his own?
A Oh, yes, and so did—you have another affidavit there and that is under Claurie Perry, is her marriage name now. That is a relative of his, that is Lloyd Carl's daughter.
Q She is no relation to you?
A No relation whatsoever to me.
Q And you also stated your landlord, Mr. Isadore Sheffness—
A Mr. Isadore Sheffness.
Q To furnish an affidavit statement?
A Yes, he knows the relationship.
Q But he didn't want to get involved?
A No he didn't, not that he didn't want to get involved, it wasn't a matter that he didn't want to get involved, it was just a matter—that he kept saying yes, yes, yes, but in his line of work he just kept forgetting to sign it and send it in, or whatever was requested in.
[70] Q Do you think probably the reason might be that Mr. Cuffee's work was on part-time and they might not have checked—collected the Social Security?
A I couldn't say.
Q That all the money that Mr. Cuffee earned while working for Mr. Sheffness was not turned over—
A Well Mr. Sheffness would come to the house, he would bring Robert—bring Robert home. He would sit there and he would figure out what he owed him and whatever he owed him he would give to me and in turn the rent would come out of that.
Q So that—now Mr. Cuffee also during his lifetime opened a charge account for these children, is that right?
A Yes, he had a charge at Gray's which is now out of business.
Q And you tried to determine if there were any records but you were unable to because they are out of business?
A It's too long.

Q So in answer to your question there was no written acknowledgement of these children, you meant to say that you were unable to obtain any written acknowledgement but there may be some on records which are lost or destroyed or somewhere else?

A Yes.

Q And there are two records that you know of that one's [sic] existed where he acknowledged these children?

A Two.

[71] Q One was the Internal Revenue?

A Yes.

Q The other was the charge account he had at Gray's?

A Yes.

Q He also had a charge account with a door to door salesman?

A Yes. I don't think of his name but he used to have him come to the house for his shoes and he would pay him so much every week.

Q And you have been unable to get that record?

A I can't—can't remember his first name.

Q Well you're certain that Mr. Cuffee gave both these children—

A He certainly did.

Q And always acknowledged them as his own?

A Yes.

Q That's all.

EXAMINER: There's just one thing I'd like you to clear up for me if you can, Mrs. Lucas, I notice in one exhibit here which purports to be a certification of the record of birth of Darin Edward Lucas from the City Registrar in Providence, Rhode Island, and I might say, Mr. Pearlman, I have not seen this record and I do not know whether it is an accurate certification or not but perhaps this lady can clear it up. On the certification it says the name of the mother was Belmira Gonsalves.

CLAIMANT: My maiden name.

Q Now it says the name of the father was Raymond Lucas. Who is Raymond Lucas?

[72] A Now that was what I was trying to tell Mr. Pearlman—I couldn't remember. I have the habit, or I had the habit—everything I did, I did under my name.

Q I see.

A Never anything that carried his name. Secondly I couldn't even remember from the first birth as to when I went to the hospital whether I gave Robert's name or whether—in order to have no repercussion I gave Raymond's name.

Q Who was Raymond?

A That was my husband.

Q That was your—that was your first husband?

A My first husband.

Q And is he alive?

A No he isn't.

Q How long is he dead?

A He's been dead six years.

Q Six years. I see. All right, so that in any event when the birth was recorded you might have given the name Raymond Lucas?

A Yes.'

Q But you say now that, of course, the father was not Raymond?

A Oh, no it wasn't Raymond.

Q I'm satisfied in my own mind to be perfectly frank with you and Mr. Pearlman, I might say this to you, I'm satisfied in my own mind that this man was the father of these two children; the crux of this whole matter appears to be whether or not he was contributing to the support of these [73] children at the time of his death. We have your evidence, of course, and you can, I'm sure, appreciate the fact that there is some conflicting evidence in the file, Mr. Pearlman.

ATTORNEY: (Nodding) Yes.

EXAMINER: Is there anything further that could be brought out this morning?

ATTORNEY EXAMINES THE CLAIMANT

Q On that latter issue well I'd just like to get this in the record. Now, Mrs. Lucas, you testified before that you and Mr. Cuffee lived together up to two years prior to Mr. Cuffee's death?

A Yes, around that time.

Q Now up until that time did he support these two children regularly?

A Robert has always supported his children. He's never denied his children. He has always supported them.

Q But I'm asking you up to the time you separated two years prior to his death, did he?

A Yes he did.

Q What was the average amount he gave?

A Oh, well at that time it was whatever he made—if he made fifty, if he made sixty, because he did wallpapering and painting and whatever he made he brought it home.

Q And were there times when he didn't work did he still give you money?

[74] A Yes, he did. He certainly did even when he wasn't working and we was together he got the money and he got it from his mother.

Q Now after you became separated in the two years prior to his death, did Mr. Lucas continue any support —any payments?

A Mr. Lucas?

Q Pardon me, Mr. Cuffee. Can you tell the honorable party just how—what he did?

A In what way?

Q How he supported them—how much money he gave?

A Oh, he would give the money to his daughter if it was—sometimes it would be in a lump sum, sometimes it would be ten or fifteen dollars, sometimes five dollars but at the end of the space of a week it would amount to about twenty or twenty-five dollars and he would give this to her to give to me for them.

Q And how long did this continue during that two years prior to his death?

A I would say up until about three or four weeks before he passed away because she hadn't been over there, she hadn't seen him.

Q I see. In other words he would give this money to the oldest child?

A To Ruby.

Q When he went over—

A To visit him.

[75] Q And at that time Mr. Cuffee was living?

A With his mother.

Q With his mother?

A Uh huh.

Q Did he ever come during that period to your house?

A No, he wouldn't come to the house but he would come outside.

Q And would he give money then?

A He would give it to her. You see he didn't know what apartment I lived in and I guess he was a little embarrassed under the conditions that he was under to ask anybody.

Q And that's why Mr. Cuffee had become a heavy drinker?

A Yes.

Q And that was the reason for your separation?

A That's it. He had gotten along fine with his children.

Q Who gave him the money for his drink?

A His mother.

Q And how much on the average of a week would she give him?

A Oh, she would give him on the average anywhere from forty-five to fifty; plus she would buy his liquor.

Q Now is it possible that he gave money to Ruby without his mother's knowledge?

A Oh, she didn't know. No, she didn't know that he was—that this money was going towards his children's support.

[76] Q During this two year period?

A She didn't know that until I went to the house and told her.

Q Was this after his death?

A This was after his death. I said well he thought enough of them to support his children so why is it you are blocking everything now and her answer was you took him away from me, now neither one of us have him and you shall have nothing of his now.

Q Robert Cuffee was an only child?
A An only child.
Q And his mother was very jealous of him?
A She was very possessive.
Q And she was over-protective?
A Yes.
Q Is that right?
A Like I said, everything would have been all right. I think everything would have been accepted if I in turn had gave her my oldest daughter, Jane. In other words give her Jane in return for Robert so that she would not be left without anything but when I took Jane away from her it started everything rolling downward.
Q And there was a strong jealousy between you and—
A And her.
Q And of the mother—Robert Cuffee, but there is no question that he gave regular support payments for the two years prior to his death up until three weeks before he died?
[77] A That's right. Those children didn't want for anything as long as he was living.
Q What did the amount of money that he gave for the support of these children during that two year period average?
A I'd say it averaged anywhere between twenty-five and thirty dollars a week; very seldom that it went below that.
Q And with that money would you and the children go shopping for food? What did you use it for?
A No. Ruby was old enough to get—if there was something that they needed she was old enough when he did have the money and would tell her go ahead and get what she needed or to get her brother anything he needed in the form of clothes or shoes. She was old enough to take him.
Q How old was Ruby during this period of time?
A Fifteen—sixteen—she's now eighteen, so she was old enough and as far as the marketing or anything like that, well I did that I mean, but as far as clotheswise, shoes, or anything, I mean—

Q She bought with this money all her clothing for her and her brother?
A Well she knew that her father gave her this money to give to me for their use so, therefore, this was their money.
Q And did she also buy some groceries and things?
A Well, yes, I did the marketing.
Q Would she give you any of this money for the marketing?
A Yes.
[78] ATTORNEY: That's all.
EXAMINER: Is it your desire, Mr. Pearlman, to make a closing statement or file a brief in this matter?
ATTORNEY: Well I'd like to reserve that right. I'd like to talk with your honor concerning any issues that might be troubling you that I may be able to do. For example in a case of this kind I would like to before closing make an offer of proof if there is any question in your honor's mind concerning the question of the fact that he supported these two children I would offer to bring in the child, herself, who received this money and testify. I submit that that is what she would testify to if your honor needs an offer of proof but the question in my mind—but I know that the—your honor, that the practice of a hearing body is not to get the children involved unless it's absolutely necessary.
EXAMINER: Oh, yes, I would hesitate to have her testify unless you feel, Mr. Pearlman, that this is what she would testify to.
CLAIMANT: May I say something?
EXAMINER: Yes.
CLAIMANT: You have an affidavit in there from a George Halloran. Now I do not know if George Halloran is at this address because I am not associated with him but this was Robert's bosom pal right up until the day he died.
EXAMINER: Yes.
[79] CLAIMANT: Now George Halloran knows the whole circumstances to the point that that woman never left the house in the morning to go to work that she

didn't leave him the money, set it on the table, his cup of coffee and his liquor.

EXAMINER: Uh huh.

CLAIMANT: And when she came home at night she had an armful of liquor, more money for Robert Cuffee and, of course, no food because they were too busy drinking. The mother is an alcoholic, the aunt's an alcoholic and the son was an alcoholic and this was their life, so you can draw the picture right there. And George Halloran knew everything that went on.

ATTORNEY: Well, your honor, I would like to suggest, if it would be the same to your honor, I would submit a signed affidavit of what the daughter would testify to but I know and I submit and I offer that she would testify to the facts the two children were supported.

EXAMINER: Yes.

ATTORNEY: I could either bring her in or an affidavit.

EXAMINER: I wouldn't think that it would be necessary, Mr. Pearlman, to bring this girl in. I don't want to open up any wounds.

CLAIMANT: I was getting ready to say that because there are a lot of complications now.

EXAMINER: Certainly. If you want I will do this, why don't I withhold my decision in this matter for a period of ten days, would that be sufficient for you to talk to the girl?

ATTORNEY: Sure.

[80] EXAMINER: And find out from her—you see, the thing that puzzles me and the thing I'm faced with and I'm sure you as an attorney appreciate the fact this lady comes in and certainly I'm not going to say that I don't give some credence to her testimony, on the other hand her testimony is almost completely contradicted by contacts with the Social Security Administration has had with the mother of Robert Cuffee. What I would be interested in, Mr. Pearlman, is any information that this girl might have, and certainly during the period she was alert and old enough to be able to have a memory of the amounts that her father would give

her, and the occasions on which the father would give her this money so I will withhold my decision then for a period of ten days and if you get me a form of an affidavit from her, if you will.

ATTORNEY: Your honor, what address would you like me to submit this to?

EXAMINER: We'll give you a return envelope and you can send it in.

ATTORNEY: All right I'd like that opportunity.

EXAMINER: All right, fine, if there's nothing further to come before the hearing I'll declare the hearing closed in the taking of the oral testimony but I will withhold my decision until you have an opportunity to submit an affidavit from Ruby, is it?

[81] CLAIMANT: Too bad she can't get down here.

(Hearing closed at 11:30 A.M., March 24, 1971 at Providence, Rhode Island)

CERTIFICATION

I have read the foregoing transcript and hereby certify that it is a true and complete record of the hearing.

/s/ Margaret K. Mruarty
Hearing Assistant

EXHIBIT 10

[SEAL]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

STATEMENT OF CLAIMANT OR OTHER PERSON

Name of wage earner or self-employed person
Robert E. Cuffee
Social Security Account Number
039-12-1375

NOTICE.—Whoever makes or causes to be made any false statement or representation of a material fact in an application or for use in determining a right to payment under the Social Security Act is subject to not more than a $1,000 fine or 1 year of imprisonment, or both.

Understanding that this statement is for the use of the Social Security Administration, I hereby certify that—

1) When did Mr. Cuffee stop contributing for children? Mr. Cuffee gave me at least $20-$25 per week almost until the week he died.

2) What were the names and addresses of his employers from June 1966 to June 1968? He was self-employed as a paper hanger and painter. He also got $50-$60 per week from his relatives.

3) What were dates he worked for each employer? It varied and since he was drinking heavily at this time no records were kept.

4) What were his earnings from June 1967 to June 1968? His earnings varied, as he charged according to rooms and sizes of them and he always had money in his pocket supplied by his family.

From 1965 to June of 1968, I worked for Cable Electric Company, Daboll Street, Providence, R.I. and earned $36 per week take home pay. This was my only income

other than the weekly support of the children averaging $20 to $25 per week from Robert E. Cuffee. From this money I had to pay $20 per week rent plus heat for my tenement at 49 Brattle St. Providence, R.I.

Mr. Cuffee and I had lived together as man and wife from 1946 to about December, 1965 when he went back to live with his mother and aunt on Lockwood Street in Providence. He would visit with me at least two or three times a week to see his children. And he gave at least $20 to $25 per week for their support. They called him Daddy and he called them son and daughter. They visit their father's grave in North Burial Ground in Providence. He bought them presents at birthdays, holidays and Christmas. He took them out for ice cream and introduced them always as his own children. When we lived together, he turned over his whole pay to me to run the house. He bought the children clothes.

Knowing that anyone making a false statement or representation of a material fact in an application or for use determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I certify that the above statements are true.
Signature of person making statement—

/s/ Belmira Lucas
142 Dodge St.
Prov., R.I. 02907

Feb. 23, 70

EXHIBIT 11

[SEAL]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

STATEMENT OF CLAIMANT OR OTHER PERSON

Name of wage earner or self-employed person
Robert E. Cuffee
Social Security Number
039-12-1375
Name of person making statement (*If other than above wage earner or self-employed person*)
Thomas W. Pearlman

NOTICE.—Whoever makes or causes to be made any false statement or representation of a material fact in an application or for use in determining a right to payment under the Social Security Act is subject to not more than a $1,000 fine or 1 year of imprisonment, or both.

Understanding that this statement is for the use of the Social Security Administration, I hereby certify that—

Was there any insurance? NO
Was there a bank book? NO
Any medical insurance? NO
Income tax return? NO
Any letters regarding this? NO

Where did Mr. Cuffee obtain money? which he contributed to weekly support of children? From his mother and Aunt.

Our records show that he did not work after 1966. Please enter below the sources from where such money was obtained, such as names and addresses, etc. Miss Madeline Cuffee, Miss Hazel Cuffee (new address) Ford St. old address Lockwood St.

From 1965 to June of 1968, I worked for Cable Electric Company Daboll St., Providence, R.I. and earned $36 per week take-home pay. This was my only income other than the weekly support of the children averaging $20-$25 per week from Mr. Robert E. Cuffee. From this money, I had to pay $20 per week rent plus heat for my tenement at 49 Brattle Street, Providence, R.I. Mr. Cuffee and I had lived together as man and wife from 1946 to about December 1965 when he went back to live with his mother and aunt on Lockwood Street in Providence. He would visit with me at least two or three times a week to see his children. And he gave at least $20 to $25 per week for their support. They called him Daddy and he called them son and daughter. They visit their father's grave in North Burial Ground in Providence. He bought them presents at birthdays, holidays and Christmas. He took them out for ice cream and introduced them always as his own children. When we lived together he turned over his whole pay to me to run the house. He bought the children clothes.

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I certify that the above statements are true.

Signature of person making statement—

/s/ Belmira Lucas
142 Dodge St.
Prov., R.I. 02907

4/21/70

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING EXAMINER'S DECISION

In the case of

Belmira Lucas
(Claimant)

Robert E. Cuffee
(Wage Earner) (Leave blank if same as above)

Claim for

Child's Insurance Benefits
039-12-1375
(Social Security Number)

This matter is before the Hearing Examiner as a result of a request for hearing filed on September 28, 1970 by Belmira Lucas, the claimant, who is dissatisfied with the prior determination denying her application for children's insurance benefits filed by her on behalf of Ruby M. Lucas and Darin E. Lucas.

Belmira Lucas filed an application for surviving child's insurance benefits on behalf of Ruby M. Lucas and Darin E. Lucas on October 24, 1968. By letter dated September 13, 1969, she was advised that her application had been denied. She filed a request for reconsideration and by letter dated August 21, 1970 was advised that the initial determination was affirmed.

STATEMENT OF ISSUES

The general issue to be determined is whether Ruby M. Lucas and Darin E. Lucas are entitled to children's insurance benefits based on the earnings record of Robert E. Cuffee under Section 202(d) of the Social Security Act, as amended. The specific issues on which findings

will be made and conclusions will be reached are whether Ruby M. Lucas and Darin E. Lucas are the children of Robert E. Cuffee as defined in Section 216(e) of the Social Security Act, as amended.

SUMMARY OF THE TESTIMONY OF BELMIRA LUCAS

At the hearing Belmira Lucas testified substantially as follows: She was never married to Robert Cuffee but lived with him from 1946 to 1968. Two children were born of this union. Their names are Ruby Marie Lucas and Darin E. Lucas. Robert Cuffee never acknowledged in writing that they were his children but always treated them as his children. She and Robert Cuffee separated two years before he died. He then lived with his mother. He died in June, 1968. While they were separated he contributed to the support of the children. He gave money to Ruby Lucas each week. This averaged $25 to $30 a week. Robert Cuffee did not work for some years before he died. He got the money he gave to his children from his mother. He was an only child. His mother will not assist in the prosecution of this claim. His aunt lives with his mother and she also gave Robert Cuffee money. He was unable to work for the last few years of his life. His aunt paid all the household expenses while she, Robert Cuffee, and his mother lived together. The money earned by his mother was all given to Robert Cuffee. On one occasion Robert Cuffee filed a federal income tax return and claimed Ruby as a dependant. This was before Darin was born. He was notified that he could not claim her as a dependant. The children are named in the obituary notice (Exhibit 16.) The mother arranged for the funeral and gave the information to the funeral director. Robert Cuffee always called the children his son and daughter. He opened a charge account for the children. When Darin was born, she might have given the father's name as Raymond Lucas. Raymond Lucas was her husband. He has been dead for six years. Her maiden name was Belmira Gonsalves. Darin's father was Robert Cuffee. Up until they sepa-

rated Robert Cuffee supported the children. Even when he wasn't working he gave her money which he got from his mother. After they separated he gave all contributions to his daughter. He gave her an average of $20 to $25 a week right up to three or four weeks before he died. His mother gave him $45 to $50 a week and also bought his liquor. His mother did not know he was giving money to his children. Robert Cuffee, his mother, and his aunt were all alcoholics.

SUMMARY OF THE RECORD

In an application for lump sum death payment filed by Madeline Cuffee on August 2, 1968 it is stated: "Robert had not worked the last six or seven years at least." (See Exhibit Number 1.)

It appears that Robert Edward Cuffee applied for a Social Security Account Number on October 13, 1942 and that number 039-12-1375 was issued to him. (See Exhibit Number 2.)

In an application for surviving child's insurance benefits filed by Belmira Lucas on October 24, 1968 it is stated: "I lived with Robert Cuffee in a common law union. The two children are of this union. I started living with the W.E. in 1948 and separated from him in 1966." (See Exhibit Number 3.)

In a statement dated November 1, 1968, Clara Carle (Mrs. Clara B. Perry) advised that Robert Cuffee acknowledged Ruby and Darin Lucas as his own children. (See Exhibit Number 26.)

In a statement dated December 8, 1968, Belmira Lucas advised that the two children were of the common law union between Robert Cuffee and herself which began approximately 1948 and ended in 1966. She stated that the wage earner and she had never married since she was not free to marry. She listed the names and addresses of people who could attest to the fact that the children were the children of Robert Cuffee. (See Exhibit Number 23.)

In a statement dated January 7, 1969, Lloyd E. Carle advised that as far as he knew Darin and Ruby Lucas were the children of Robert Cuffee. (See Exhibit Number 21.)

In a statement dated June 25, 1969, Belmira Lucas advised: "Robert Cuffee worked but was self employed from 1964 to about the middle of 1966 which he gave me between $45-50 a week, when his health failed and he was unable to work steady. Then it varied between $30 and $35 until he couldn't work so from the end of 67 until his death in 68 he was unable to support them, but I worked." In a further statement regarding contributions dated June 25, 1969, Belmira Lucas advised that the claimant's names were Ruby and Darin Lucas, that the contributions to the claimant's support by Robert E. Cuffee ended in 1967, that there was a break in contributions in 1967 and 1968 and that the reason for this was that Robert Cuffee was in ill health. (See Exhibit Number 19.)

In a certification of contents document it is reported that in a birth record filed with the City Registrar of Providence, Rhode Island as document #8263 it is stated that Darin Edward Lucas was born at Providence, Rhode Island on October 28, 1960, that the name of the mother was Belmira Gonsalves and that the name of the father was Raymond Lucas. (See Exhibit Number 19.)

In an obituary notice reporting the funeral of Robert E. Cuffee, Ruby Marie and Darin Edward Cuffee are listed as survivors. (See Exhibit Number 17.)

In a statement dated January 26, 1970, George Harold advised that Robert E. Cuffee was the father of Ruby Lucas and Darin Edward Lucas, that he acknowledged the children as his own, gave them gifts, gave Belmira Lucas money from time to time for the support of these children, and told her, Clara Perry [sic], frequently that he was the father of the children. (See Exhibit Number 15.)

In a report of contact, which is undated, it is reported that in a telephone conversation apparently in June, 1970, Hazel Cuffee advised that she could tell nothing about money given to her brother from June, 1967 to June, 1968. (See Exhibit Number 14.)

In an undated statement, Madeline Cuffee stated: "I allowed my son to live with me for a while. I fed him and occasionally I gave him small sums when he wasn't working. I have no records of any sort and I am a sick woman unable to recall any periods of time, exact dates or amounts of money. He did live for several years up to the time of his final illness." (See Exhibit Number 12.)

In a statement dated February 23, 1970, Belmira Lucas advised that Robert Cuffee gave her at least $20 to $25 a week almost until the week he died. She also advised that from June, 1966 to June, 1968 he was self employed as a paper hanger and painter and that he also got $50 to $60 a week from his relatives. It is interesting to note that Belmira Lucas stated as follows. "Mr. Cuffee and I had lived together as man and wife from 1946 to about December, 1965 when he went back to live with his mother and aunt on Lockwood Street in Providence. He would visit with me at least two or theree times a week to see his children. And he gave at least $20 to $25 per week for their support. They called him Daddy and he called them son and daughter." (See Exhibit Number 10.)

In a statement dated April 21, 1970, Belmira Lucas advised that Robert Cuffee obtained money from his mother and aunt which he contributed to the weekly support of his children. It is interesting to note that she again gave the same information that is quoted immediately above. (See Exhibit Number 11.)

Subsequent to the hearing, an affidavit dated March 29, 1971 and signed by Ruby Marie Lucas was submitted. In this affidavit she advised that she was the daughter of Belmira Lucas and the late Robert Edward Cuffee, that two years prior to his death Robert Cuffee was separated from her mother and that after the separation he gave

her an average of $20 to $25 a week for support and personal needs for herself and her brother, Darin Lucas. She stated that he would usually give her the money in cash when she went to visit him and that he told her he didn't want his mother to know this as she would be very angry if he used the money given to him by his mother for the support of his children. She advised that Mr. Cuffee's mother and aunt both have drinking problems and that the mother is very jealous of her mother and that there was ill feeling between them. She stated that when Mr. Cuffee did not work he got all his money from his mother and that his mother did not need any money to run the house because her aunt, or Robert Cuffee's sister, used all her earnings for running the mother's home. She advised that when Mr. Cuffee was working at the Providence Journal he claimed her as a dependent on his federal income tax, that he had a charge account at Gray's Clothing Store for herself and her brother and that he arranged with a door to door salesman so that the children could buy whatever clothing they needed right up until the time of his death. (See Exhibit Number 28.)

DISCUSSION OF THE EVIDENCE

Section 202(d) of the Social Security Act, as amended, as applicable here, provides that under specified circumstances a child (as defined in Section 216(e)) of an individual who dies a fully or currently insured individual might be entitled to the payment of child's insurance benefits.

Section 216(e) of the Act defines the term child.

Section 216(h)(3) of the Social Security Act provides that an applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under Paragraph (2), shall nevertheless be deemed to be the child of such insured individual if such insured individual has acknowledged in writing that the applicant is his son or daughter, has been decreed by a court to be the father of the applicant, has been ordered by a court

to contribute to the support of the applicant because the applicant is his son or daughter, or such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual died.

Certain facts in this matter are undisputed. They are that Robert Cuffee and Belmira Lucas were never legally married, that for some years prior to his death Robert E. Cuffee was not living with Belmira Lucas or Ruby M. Lucas and Darin E. Lucas and that Robert E. Cuffee died on June 18, 1968. Efforts to obtain some written acknowledgement by Mr. Cuffee that he was the father of Ruby M. Lucas and Darin E. Lucas have been unsuccessful. In order that it might be found that Ruby M. Lucas and Darin E. Lucas are entitled to children's insurance benefits based on the earnings record of Robert E. Cuffee, two facts must be established; namely, (1) that there is sufficient satisfactory evidence to establish that Robert E. Cuffee was the father of Ruby M. Lucas and Darin E. Lucas and (2) that Robert E. Cuffee was contributing to the support of Ruby M. Lucas and Darin E. Lucas at the time that he died.

While the fact that it has been reported that on the birth record of Darin Edward Lucas it is stated that the name of the father is Raymond Lucas (See Exhibit Number 19) casts some doubt on the question of whether Robert E. Cuffee was the father of Darin Lucas, the thrust of the evidence rather clearly indicates that he was the father of both Darin Edward Lucas and Ruby Marie Lucas. However, in this particular matter a finding that he was the father of these children is academic unless it can be established by the evidence that he was contributing to the support of these children at the time that he died.

There are certain inconsistencies in the information supplied by Belmira Lucas which casts rather grave doubt on the fact that Robert Cuffee was contributing to the support of these children at the time that he died. Unfortunately, when she filed her application for surviving child's insurance benefits on October 24, 1968, Item 14B on the application was not completed. (See Exhibit Number 3.) In her statement dated June 25, 1969, Belmira Lucas advised that Robert Cuffee was unable to support the children from the end of 1967 until his death in 1968. (See Exhibit Number 19.) In her statement regarding contributions dated June 25, 1969, she advised that Robert Cuffee stopped contributing to the support of these children in 1967, that there was a break in his contribution to the support of these children during 1967 and 1968 and that this break was due to his ill health. (See Exhibit Number 19.) It is of some significance that these statements were signed by Belmira Lucas prior to the date that she received the reconsideration determination and that since she received the reconsideration determination the information supplied by her has changed. In two statements signed by Belmira Lucas, one of February 23, 1970 and one on April 21, 1970, she advised that after she and Robert Cuffee had separated he would visit with her at least two or three times a week to see his children and that he gave at least $20 to $25 a week for their support. (See Exhibits 10 and 11.) It is significant that at the hearing this lady testified that Ruby Lucas obtained money from her father when she, Ruby Lucas, went to visit her father at his mother's house. Belmira Lucas testified that Robert Cuffee never came to visit the children in her house after the separation, that he would sometimes come across the street from the house and that he did not know what apartment she was living in. In addition to the inconsistencies in Belmira Lucas' statements, the information supplied in Exhibits Number 15 and 16 casts some further doubt on the question of support. These exhibits are affidavits obtained from Clara Perry and George Harold on January 26, 1970. In each of these affidavits it is stated that Mr. Cuffee often visited the home of Belmira Lucas, both before the birth of these children and afterwards, acknowledged the children to be his own, gave them gifts, gave her money from time to time for the support of these minor children, and frequently acknowledged that he was

the father of the children. From this information there is even some doubt cast on whether or not Robert Cuffee ever lived regularly with Belmira Lucas. Of course the present allegations of Belmira Lucas with reference to the question of support is further weakened by the information supplied by Madeline Cuffee, the mother of Robert Cuffee. In a statement which is set forth as Exhibit Number 12 she advised that her son lived with her, that she fed him and that occasionally she gave him small sums when he was not working.

The fact finder is not compelled to believe the testimony of an interested witness even if it is not squarely contradicted. Credibility determinations rest with the Secretary and the finality of his findings also extends to reasonable inferences which may be drawn from the evidence. The Hearing Examiner is unable to conclude that Robert Cuffee was contributing to the support of Ruby M. Lucas and Darin E. Lucas at the time that he died. He finds specifically that he was not so contributing at that time and therefore finds that Ruby M. Lucas and Darin E. Lucas are not entitled to children's insurance benefits on the earnings record of Robert E. Cuffee.

/s/ George V. Flavin
GEORGE V. FLAVIN
Hearing Examiner
Room E-130
John F. Kennedy Federal Building
Boston, Massachusetts

Date May 6, 1971

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20013

[HEW Emblem]

Refer to: HA:C

039-12-1375

Bureau of
Hearings and Appeals

Jan. 5, 1972

ACTION OF APPEALS COUNCIL ON
REQUEST FOR REVIEW

Mrs. Belmira Lucas
142 Dodge Street
Apartment 3-D
Providence, Rhode Island 02907

Dear Mrs. Lucas:

Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed. Evidence in addition to that which was before the hearing examiner has been received by the Appeals Council.

The Appeals Council has concluded that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would be of advantage to you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this date. See section 205(g) of the Social Security Act, as amended (section 405(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

Carl Monk
Member, Appeals Council

cc:
Mr. Thomas W. Pearlman
Attorney at Law
Providence, Rhode Island 02907

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL
REMANDING COURT CASE TO
ADMINISTRATIVE LAW JUDGE

In the case of

Belmira Lucas
(Claimant)

Robert E. Cuffee
(Wage Earner)

Claim for

Child's Insurance Benefits
039-12-1375
(Social Security Account Number)

The United States District Court has remanded this case to the Secretary of Health, Education, and Welfare for further administrative action. The Appeals Council hereby vacates its denial of the claimant's request for review and remands this case to an administrative law judge of the Bureau of Hearings and Appeals for further proceedings.

On remand, the claimant shall be provided adequate opportunity to comment on any additional evidence, to submit material evidence, to raise pertinent objections, to examine and cross-examine witnesses, and to propose findings of fact and conclusions of law. Upon completion thereof, the case shall be returned with a recommended decision to the Appeals Council for its decision. A copy of the recommended decision shall be sent to the claimant.

That because the court has ordered that the administrative proceedings shall be concluded within 3 months of

March 2, 1973, the administrative law judge shall return his recommended decision to the Appeals Council no later than May 4, 1973.

The claimant will be given the opportunity to file with the Appeals Council, within 10 days from the date of the recommended decision, briefs or other written statements of exceptions and comments as to applicable facts and law. After the 10-day period has expired, the Appeals Council will review the record and issue its decision.

APPEALS COUNCIL

/s/ Carl Monk
Carl Monk, Member

/s/ John W. Chambers
John W. Chambers, Member

Date Mar. 14, 1973

[180] (The following is a transcript of the supplemental hearing held before Anthony J. Iacobo, an Administrative Law Judge of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare on April 3, 1973 at Providence, Rhode Island, upon a remand of the Appeals Council, Washington, D.C. pursuant to an Order of Remand, dated March 2, 1973, by the United States District Court for the District of Rhode Island, in the case of Belmira Lucas, claimant, in behalf of Ruby M. Lucas and Darin E. Lucas, based on the earnings record of Robert E. Cuffee, deceased wage earner, social security account number 039-12-1375. The claimant, Belmira Lucas, appeared in person accompanied by her daughter, Mrs. Gail Silva, and was represented by her attorney, Thomas W. Pearlman.)

(The hearing commenced at 10:15 a.m. on April 3, 1973.)

OPENING STATEMENT BY THE ADMINISTRATIVE LAW JUDGE:

JUDGE: The hearing will come to order. This case is before the Administrative Law Judge by an Order of Remand of the Appeals Council, dated March 14, 1973, authorizing the taking of further evidence in this case pursuant to an Order of Remand, dated March 2, 1973, of the United States District Court for the District of Rhode Island. Who appears for the claimant, Mrs. Belmira Lucas?

ATTORNEY: Thomas W. Pearlman, 705 Industrial Bank Building, Providence, Rhode Island. I am a member of the Rhode Island bar.

JUDGE: Thank you, Mr. Pearlman. Now to recite basically the history of this proceeding to the present time. The claimant filed an application for surviving child's insurance [181] benefits in behalf of Ruby M. Lucas and Darin E. Lucas on October 24, 1968. This claim was denied initially in September 1969. The denial was affirmed on reconsideration the following year

and the claimant filed a request for hearing. After a hearing was held the application was denied and a decision issued by another Administrative Law Judge. At that time the title was Hearing Examiner. On May 6, 1971 the decision was affirmed, in effect, by the Appeals Council which denied a Request for Review of the decision. From that action an Appeal was taken before the United States District Court for the District of Rhode Island which resulted in the instant supplemental hearing. The purpose of the supplemental hearing is for the taking of additional evidence and findings as to whether a valid common-law marriage existed between Belmira Lucas and Robert Cuffee such as to cause Ruby M. Lucas and Darin E. Lucas to fit within the definition of child under the appropriate Section of the Social Security Act. Is that your understanding of the court's Order of Remand, Mr. Pearlman?

ATTORNEY: Yes, your honor.

JUDGE: Now, I understand that in addition to the claimant, her daughter, Mrs. Gail C. Silva, is going to be testifying as well. Is that correct?

ATTORNEY: Yes, your honor.

[182] (The claimant, BELMIRA LUCAS, and witness, MRS. GAIL SILVA, duly sworn.)

JUDGE: Now, counsel, you had an opportunity to review these two additional exhibits to be added to the exhibits of record and they have been marked, to continue the enumeration, Exhibit 29 which is a telephone conversation recorded on December 5, 1968, and Exhibit 30 dated June 11, 1970 which is a statement from The Providence Journal and The Evening Bulletin, and I understand that you have no objection to these being received into the record?

ATTORNEY: Right, that is correct.

JUDGE: Exhibits 29 and 30 are received into the record. Do you have any documents to submit other than the brief that you have submitted which will be included as part of the procedural record although not as exhibit as such?

ATTORNEY: Well, your honor, other than the law of the State of Rhode Island which, I think, is contained in my brief and I want to state on the record an important attitude of the State of Rhode Island which is contained in the brief, Sections 15-8-21 of the General Laws of the State of Rhode Island of 1956, as Amended, which states as follows: "Illegitimate children shall become legitimatized by the subsequent marriage of their parents to each other and the issue of marriage is declared null in law shall nevertheless be legitimate" in this case. That's [183] been embodied in our case. I think it would be important in the consideration of—I am reserving my right to present any further documents which the court might deem necessary but at this time I don't have anything else.

JUDGE: Well, one thing comes to mind before I turn the case really over to you for you to present your evidence Mr. Pearlman, and that is I would anticipate there would be a death certificate showing that Mr. Lucas did die and the date and place he died.

ATTORNEY: We certainly would furnish that. That's a matter of public record. Might I inquire from my client? Where did he die? (Turning to claimant.)

CLAIMANT: He died in Tiverton, Rhode Island.

ATTORNEY: We can furnish that.

JUDGE: In where?

CLAIMANT: Tiverton, Rhode Island.

JUDGE: His date of death?

CLAIMANT: January 19, 1965.

ATTORNEY: I would agree that would be relevant and I'd be happy to furnish that to your honor.

JUDGE: All right and inasmuch as you are as cognizant [184] as I am of the limitations that the court has placed on the amount of time that this proceeding should continue at the Administrative level, I hope to receive this document from you with 7 days.

ATTORNEY: All right.

JUDGE: Since we are on this topic, will you state your name for the record so as to identify yourself? (Addressed to Claimant.)

CLAIMANT: Belmira Lucas.

JUDGE: You gave the date that Mr. Lucas died. How did you learn that information?

CLAIMANT: Well, I learnt that through his first cousin's wife. She notified me of his death.

JUDGE: When was that?

CLAIMANT: The day that he died, the date that he died.

JUDGE: Did you ever inform Mr. Cuffee of this information?

CLAIMANT: Yes, he was well aware of it.

JUDGE: Was this around that time or when?

CLAIMANT: Well, he knew about it the same day that I knew about it.

JUDGE: In other words you learned about it and told him?

CLAIMANT: Yes, he knew about it.

EXAMINATION OF CLAIMANT BY ATTORNEY:

Q Would you please state your address?

[185] A 142 Dodge Street, Providence, Rhode Island.

Q And besides the name of Belmira Lucas have you been known by any other name?

A I have been known by Mrs. Cuffee.

Q And did you live with Mr. Robert Cuffee?

A Yes, I did.

Q What dates?

A I lived with him for 18 years from 1948 to 1966.

Q Did you both hold yourself out as husband and wife?

A Yes, we did.

Q And among family and friends how were you known?

A I was recognized as his wife.

Q And did you become close during those 18 years to his family, Madeline Cuffee and his aunt?

A Very much so.

Q And could you tell the court in what way you became close to his family?

A Well, I mean we were always together. Wherever we went they were always with us. In our holidays, birthdays or anything that came up, I mean, we were always together.

Q Did you sleep in the same bedroom as Mr. Cuffee those 18 years?

A Yes, we did.

Q And did the children, Ruby and Darin, refer to you both as father and mother?

[186] A Yes, they did.

Q Now, where did you spend your Christmas days during those 18 years?

A Our Christmas' were spent with his mother and his aunt.

Q What are their names?

A Madeline Cuffee and Hazel Cuffee.

Q And during those 18 years where was Thanksgiving spent?

A Thanksgiving was spent at our house.

Q And who was present from his family, if any?

A His mother and his aunt were the only 2 that he had.

Q He was an only child?

A He was an only child.

Q Now, could you tell us, there were 2 children of this marriage, is that right?

A Yes, there were.

Q And could you tell us how—what were their names and birth dates?

A Ruby Marie was born October 28, 1953; Darin Edward was born October 28, 1960.

Q Now, wasn't Ruby born February 7, 1953?

A Yes, February 7.

[187] Q Didn't you get the month and the date wrong?

A Yes.

Q Now, could you tell us how Ruby and Darin got their name?

A Well, Ruby was named after a very close friend of Robert's.

Q Robert Cuffee?
A And Darin Edward was named by his father.
Q What was Robert Cuffee's middle name?
A Edward.
Q And is that where Darin Edward got his middle name?
A That's where he got his middle name.
Q Were both these children born in the Lying-In Hospital?
A Yes, they were.
Q And did Mr. Cuffee visit you and the children at the hospital?
A Yes, he came every night.
Q Now, in 1950 did Mr. Cuffee buy you a ring symbolizing your marriage to him?
A Yes, he did.
Q And do you still wear this ring?
A Yes, I do.
Q Do you have it on now?
A Yes, I have.
[188] Q And that is the ring—
A Both of them.
Q Both those rings that you have on your marriage finger were bought for you by Mr. Cuffee?
A Robert Cuffee.
Q Have you worn them continuously?
A Yes.
Q Now, you have just showed us two rings on your fingers. Have you worn those rings continuously since 1950?
A I've always worn them.
Q And they were purchased for you by the late Robert Cuffee, is that correct?
A Yes; they were.
Q Now, your former husband, Raymond Lucas, when did he die and where?
A January 19, 1965 in Fogland, Tiverton, Rhode Island.
Q At the time of his death were you living as husband and wife with Robert Cuffee?
A Yes, I was.

Q And did you continue to live as husband and wife with Robert Cuffee for a period of approximately 2 years thereafter?
A Yes, I did.
Q What caused Robert Cuffee to leave your home in 1966?
[189] A Well, he was drinking excessively and became violent with his drinking and I just couldn't take the chance of having the children hurt through his drinking and we just couldn't make it no more.
Q Now, did Mr. Cuffee have charge accounts and other purchases on your behalf as husband and wife?
A Yes, he did.
Q Could you tell us what they were, if any?
A Well, he had charge accounts in clothing stores. He had a fellow that used to come to the house, shoe salesman. He had bought a stove and mixer and various other things for the house.
Q Now, were there also rent receipts?
A Yes, there were.
Q And who were these rent receipts given to you by?
A Isadore Schectman.
Q And he was your landlord?
A He was.
Q Did Robert Cuffee after he stopped working for The Providence Journal do paper, painting and other work for Mr. Schectman?
A Yes, he did.
Q Mr. Schectman owns about 100 houses—in the—
A In and around there.
[190] Q —in around the core city of the city of Providence, is that right?
A Yes.
Q And was your husband on his payroll from 1960 almost to his death at various stages when he was well enough to work?
A Yes.
Q As far as you know, however, Mr. Schectman didn't deduct social security taxes from him? Is that right?
A I don't think he did.

Q Did he pay him in cash?
A Yes, he did.
Q Now I direct your attention to some exhibits, Mrs. Lucas.

(At this point, there ensued an off-the-record discussion.)

JUDGE: We were off the record for a moment in order to have Counsel use his own set of exhibits so that I could follow along with the official ones.
ATTORNEY: Are we on the record?
JUDGE: Yes.

ATTORNEY RESUMES EXAMINATION OF CLAIMANT:

Q Directing your attention, Mrs. Lucas, to Exhibit 3 of page 91 of the transcript, a document dated apparently October 24, 1968. Is that your true signature on the—
A Yes, it is.
Q —last page of this 4 page exhibit? Is that your [191] true signature, Mrs. Lucas?
A Yes, yes it is.
Q And I direct your attention to the hand written language which appears under the remarks in Item 24 on the last page of Exhibit 3, also numbered 91 and dated October 24, 1968 and ask you whose hand writing, if you know, appears there. Is that your handwriting, Mrs. Lucas?
A No, it is not.
Q Is that the information which you furnished the Social Security Officer at the time?
A Yes, it is.
Q And I direct your attention to the language which says as follows, I quote; "I lived with Robert Cuffee in a commonlaw union. The children are of this union. I started living with the WE in 1948 and separated from him in 1966." Did you furnish that information to the Social Security Office at that time?
A Yes, I did.

Q Did you have a lawyer at that time?
A No, I didn't.
Q Now, when did Mr. Cuffee die?
A In June of 1968.
Q And about how long before that, his death, did you separate from him?
A About a year and a half.
Q Now, your former husband, the late Raymond Lucas, who died on January 19, 1965 in Tiverton, Rhode Island, what was [192] his physical condition prior to his death?
A He had had a shock all on one side.
Q Had that disabled him for a long period of time?
A Oh, yes it did.
Q When did he have that shock?
A Around 1949-1950.
Q And have you ever lived with your former husband after 1948?
A No, I didn't.
Q Now, Mrs. Lucas, I direct your attention to Exhibit 26 which appears at page 125 of the former transcript. It appears to be a document dated November 1, 1968, signed by Clara Carle also known as Mrs. Clara B. Perry. Could you tell the Court if you know Clara Carle?
A Clara Carle is a cousin of Robert Cuffee.
Q And did she consider you and Robert Cuffee as husband and wife?
A Yes, she did.
Q And were you held out as husband and wife to her?
A Yes, we were.
Q Was she at any of the family affairs with you and Robert Cuffee that you described while you were living together those 18 years?
A She was always at the house.
Q I direct your attention to Exhibit 21 at page 119 [193] of this transcript which appears to be dated January 7, 1969 and signed by a Lloyd E. Carle. Do you know Lloyd Carle?
A Lloyd Carle was a first cousin of Madeline and Hazel Cuffee.

Q And did he know you and Mr. Cuffee to be as husband and wife?

A Yes, he did.

Q And he knew that you were both the parents of Darin and Ruby Lucas, is that right?

A Yes.

Q I direct your attention to Exhibit 16 at page 110 of this transcript. Could you tell the Court if you recognize this Exhibit?

A This is the funeral services for Robert Cuffee.

Q Is that the obituary notice?

A That is the obituary notice.

JUDGE: Excuse me, is that Exhibit 16?

Q I'm sorry on my copy I can hardly read the number. It could be 17 but it is page 110. Now did you obtain that obituary notice in the paper?

A I obtained it at the Providence Public Library.

Q And who furnished the information for this obituary notice, did you write it?

A Madeline Cuffee furnished that.

[194] Q And that's the mother of the late Robert E. Cuffee. Now I direct your attention to the words: "Mr. Cuffee died on Tuesday. His survivors include two children, Ruby Marie and Darin Edward Cuffee." Is that the way some people referred to your children as Ruby and Darin Cuffee?

A Yes, they do.

Q Now, I notice that this obituary did not mention you as the widow of Robert E. Cuffee. Can you explain that to the Court?

A Well, at the time we had had a fallen out over us.

Q Who is we?

A His mother and myself.

Q His mother, Madeline Cuffee?

A Yes.

Q And what was the problem that you had with Madeline Cuffee, the mother of Robert Cuffee at the time of his death?

A Well, for one thing she was a little disturbed which I found out later on that I was a Catholic, because they were Baptist which I didn't know had any bearing on the

feelings and, secondly, I guess, he must have been giving her quite a rough time and she was taking it out on me.

Q She blamed you for his last illness?

A Well, not so must for his last illness but through his drinking, he was unbearable even with her and I imagine she felt [195] that if I had still had him she would not have to have put up with him.

Q Did you ask her to help you out filing this claim for Social Security benefits and give information to the Social Security?

A No, I did not go no where near her.

Q I see, but you learned that she did not want to assist you in anyway. Is that it?

A Well, that's what I came to the conclusion of.

Q I direct your attention to Exhibit 16 at page 108. It appears to be a statement signed by George Hareld H-A-R-E-L-D, on January 26, 1970 and ask you if you know a George Hareld?

A Yes, I know a George Hareld. He was an associate of Robert Cuffee. They were constantly together. In fact, he was with Robert Cuffee the morning that Robert Cuffee died.

Q And did he treat you as you were both husband and wife?

A Yes, he did.

Q And did he consider the children, the children of both of you?

A Oh, yes.

Q And he was very friendly with Robert Cuffee right up until—

[196] A Very much so.

Q I direct your attention to Exhibit 6 at page 104 which appears to be dated January 24, 1970 and ask you if you recognize that signature at the bottom of that page?

A That's Madeline Cuffee.

Q Did I say Exhibit 11? It should be Exhibit 12 which we are directing at, January 24, 1970.

JUDGE: It is one of April 21, 1970 which is Exhibit 11.

Q Marked page 104 on this document.

JUDGE: OK. This doesn't have a date that I see. Oh, yes, thank you. It's either 1-24 or 7-24.

Q And in 1970 had you become friends with Madeline Cuffee?

A No, by no means.

Q She was still refusing to contact you?

A That's right.

Q Did she have any contact with your children after your first son's death in June of 1968?

A I can't recall whether or not the children went to visit her. I can't say.

Q But she stopped coming over to your house?

A Yes, she stopped coming to the house.

Q Now, this says, "she did live with blank for several years up to the time of his final illness." Do you know what she meant by that?

[197] A That he had lived with me for several years up until his illness, his final illness. It was during his final illness that he was home with her.

Q And she said in that statement, "I allowed my son to live with me for awhile; I fed him; I occasionally gave him small sums when he wasn't working. I have no records of any sort and I am a sick woman unable to recall any periods of time, exact dates or amounts of money." How long did Mr. Cuffee live with his mother, if you recall, prior to his death in June of 1968?

A A little over a year.

Q Now, I direct your attention to Exhibit 11 at page 103 which is dated April 21, 1970. Is that your signature on the bottom of that page 103 of that 2 page Exhibit?

A Yes, it is.

Q And I direct your attention to the sixth line from the top of that exhibit. Did you furnish that information which I quote as follows: "Mr. Cuffee and I had lived together as man and wife from 1946 to about December 1965."

A That date is wrong.

Q Which date is wrong.

A 1965.

Q That should have been what date?

A 1966.

[198] Q But it is correct that you lived together as man and wife during that period of time?

A Yes.

Q That's all.

ADMINISTRATIVE LAW JUDGE EXAMINES CLAIMANT:

Q Now let me say, Mrs. Lucas, you lived with Mr. Cuffee and held yourselves out to be husband and wife from the time that you started to live together. Is that correct?

A Yes, it is.

Q And that's when he gave you the two rings that, if I may, identify them for the record I would describe as the usual type of engagement ring and marriage ring. Is that correct?

A Yes, it is.

Q One being plain and the other having a stone in it. Did your relationship with each other or to the community generally change in any way after your former husband, Mr. Lucas, died?

A Well, there was nothing to change because in the community they did not know Raymond Lucas. They have only known Robert Cuffee and I.

Q And in answer to some of the questions counsel put to you, you indicated that you were known as Mrs. Cuffee in the community. Is that correct?

A Yes.

Q Did anyone ever call you, Mrs. Lucas?

[199] A The only time that I was called Mrs. Lucas would be to the children's friends because they knew my older children as Lucas. So some of their friends when they would speak to me—

Q Now, you say your older children, would you identify for me who the older children are?

A I have Gilmore Lucas, Gail, which is Mrs. Silva now. I have Jane, which is Mrs. Johnson. Now she is Mrs. Johnson.

Q Jane?
A Yes, Jane and James.
Q That's four children?
A Yes, four children.
Q Gilmore, Gail, Jane and—
A —and James.
Q —and James. And did these children when they were younger reside with you and Mr. Cuffee?
A Yes, they did.
Q And so they had the name Lucas?
A Lucas.
Q I see. What was the reason when the two children born of your union with Mr. Cuffee that you gave their name in the hospital record as Lucas rather than Cuffee?
A Because I still was legally married to Raymond Lucas.
[200] Q Now, at the time that you were living with Mr. Cuffee and whether he left you and returned to his mother in '65 and '66, the point is that Ruby then was already of an age when she was going to school, is that correct?
A Yes.
Q And what was she known as?
A She went to school as Ruby Lucas.
Q And this was up to the time that Mr. Cuffee left to return to his mother's house? Is that correct?
A Yes.
Q And is that the same situation with Darin?
A With Darin.
Q All right. I have no other questions, thank you.
ATTORNEY: Mrs. Lucas, can you explain why the children went to school under the name Lucas? They required their birth certificates, is that correct?
CLAIMANT: Well, yes, their birth certificates was under Lucas.
ATTORNEY: So when you originally registered them they had to use the name, Lucas?
CLAIMANT: Yes.
ATTORNEY: That's all.

JUDGE: Do you wish to interrogate the other witness, counsel?
[201] ATTORNEY: Yes, she has been sworn, I believe?
JUDGE: Yes, she has.

ATTORNEY EXAMINES WITNESS,
MRS. GAIL SILVA:

Q What is your full name and address?
A Mrs. Gail Silva, 210 Belleview Avenue, Providence, Rhode Island.
Q How old are you?
A Thirty.
Q And when were you born?
A June 30, 1942.
Q As long as you can remember between 1948 and 1966, can you tell us anything about the relationship between Robert E. Cuffee and your mother?
A Well, at that age, you know, we just accepted things as they were and I always referred to him as my father, stepfather, you know to alleviate any questions from the children. You know, my friends in school, I said this is my father, you know and he always provided for us on birthdays and you could depend upon him for a lot of things that children like to collect, things you know, through their (unintelligible).
Q Well, a lot happened at that time, let's be specific. As far as Christmas holidays, could you tell us anything about that as far as Mr. Cuffee's family between 1948 and '66?
[202] A Are you speaking in terms of his mother and aunt?
Q Yes.
A They gave us a lot of beautiful gifts and you know they were aunt and so on. To be more specific like we used to spend a lot of nights there. You know that was a big joy of knowing them, having them as part of the family or being part of the family with them.

Q In other words, you and your brothers and sisters would actually spend time sleeping at Madeline Cuffee's home?

A Sure. That was a big treat.

Q Now, how about Thanksgiving?

A I don't remember too well. Like you know some Thanksgivings I thought we would spend at our house and other times we would spend at their house.

Q But during that time did you spend most of your Christmas and Thanksgiving holidays together with Mr. Cuffee's family?

A Right, yes.

Q Now, your natural father was Raymond Lucas, is that correct?

A Correct.

Q Did he ever come to visit your home between 1948 and 1966?

A No, he never visited us at our home.

Q And did you know anything about whether your mother [203] was divorced from him or anything like that or why she was separated from him?

A Are you speaking—

Q —of Raymond Lucas?

A Yes, I know, but at any particular period of time because that would be important?

Q Yes.

A Well, up to about 16—15, no, no, we never questioned that (unintelligible) of it. You know, later on we questioned the situation because we became more aware but prior to that no, we didn't.

Q You knew that your natural father had a shock and was totally disabled, is that right?

A Yes, but never seeing him and knowing him personally it didn't affect our situation. We referred more to Mr. Cuffee as you know more as a paternal image as opposed to Raymond Lucas.

JUDGE: And did you treat Mr. Cuffee as your stepfather in every way up until his death?

A Yes.

Q As a matter of fact do you know whether any of your family still visit the grave of Mr. Cuffee?

A We do. Yuh, I take my sister, a lot, Ruby, yuh we go up, and Eddie.

Q You mean Ruby and Darin Edward.

A Right.

[204] Q You called him Eddie?

A Right. It's very hard to get the names 'cause we have nicknamed everyone and to use proper names is rather difficult.

Q And they still visit his grave?

A Yes.

Q Does your mother visit the grave as well?

A Please? I don't know. I don't really know.

Q Did Mr. Cuffee and your mother hold themselves out as husband and wife to the community?

A Yes, my stepfather.

Q And that continued right after the death of your natural father, Raymond Lucas?

A Right.

Q And were they known by many people as Mr. and Mrs. Cuffee?

A Yes.

Q That's all.

JUDGE: In this last question as put to you—and were they known by many people as Mr. and Mrs. Cuffee, were they known to other people as not Mr. and Mrs. Cuffee?

A I can see the inconsistency of that. While I can assume that my mother's brothers and sisters knew there was no [205] wedding they knew that she wasn't legally married to him although when all the families both maternal and paternal both on our mother's side, brothers and sisters, all accepted Bobby or Mr. Cuffee as her husband. You know, nobody questioned the fact, but if they were referring they would refer to her as Mrs. Lucas. But like in terms of our immediate environment you know, anyone associated with us coming up it was always Mrs. Cuffee, you know. All affairs that we attended most of them would be addressed as Mrs. Cuffee.

JUDGE: Really, there's a question in my mind as to why Mr. Cuffee left the household to go to his mother. Could you explain that for me, please.

CLAIMANT: I thought I had explained that before. Toward the end he had gotten so that he was drinking excessively and when I say excessively it meant from morning til night. Then he would become violent and it was a constant all night hassle. Well, I started losing weight and I found that my nerves were getting quite bad from this hassle and before it affected the children I decided the best thing for him to do was to go home to his mother and this is where he went and this is where he finished living out his drinking bouts with her.

JUDGE: I see. All right thank you very much. I recall that testimony as you're saying it. Counsel, is there any statement you wish to make or are you going to rest on the brief that you submitted at the beginning of the hearing?

[206] ATTORNEY: I would like to rest on the brief and I'd like to just make one other comment which I didn't make in the brief. I think I've covered everything else. You see, Raymond Lucas had a shock in 1950 and was sick and disabled. This would explain the reason why in Rhode Island his natural wife wouldn't be able to divorce because at that time you would have to have a guardian appointed and the Rhode Island Family Courts almost never would grant a divorce when a person was incompetent of defending himself. That was the status of the Law at that time and then later on by the time he died I think (unintelligible) a number of our cases in Rhode Island, the most recent one Sardonis versus Sardonis which is quoted in my brief—

JUDGE: Please proceed, counsel.

ATTORNEY: —which was decided by Rhode Island Supreme Court in 1970 after this original application was made in this Social Security case and cited at the bottom of page 4 of my brief. Both parties had a legal impediment for marriage at the time they entered into the common-law union. Both parties were actually married and their divorces hadn't become final and so forth. Nevertheless, the Court deemed there to be a common-law

marriage immediately upon the removal of the legal impediment and there are other cases cited by Judge Pettine, had they established this relationship of a common-law husband and wife, and these things unfortunately happen. I can understand [207] the psychology of why didn't they marry immediately; go through a formal ceremony. I think what happens is most of their family and friends and those who are very close consider them married already. So they go through a formal marriage ceremony it becomes embarrassing at that time when they lived together so long. I think that's the situation here as in the other Rhode Island cases and under Rhode Island law they were legally married even though they hadn't a ceremonial marriage. Now, once that takes effect then of course the children become legitimated and it relates back as set forth in the Statutes and that in sum and substance is our position.

JUDGE: Thank you very much. As I stated earlier you have 7 days in which to submit a death certificate and any other documentary material you may wish to submit, after which I will close the record and arrive at a recommended decision which I will submit to the Appeals Council. A copy will be sent to you and pursuant to the Appeals Council order you will have ten days in which to submit any further pleading to the Appeals Council that may be generated from my recommended decision. There being nothing further the supplemental hearing in this case is closed.

(The hearing was closed at 11:05 a.m. on April 3, 1973.)

JUDGE: The record in this case was reopened at Boston, Massachusetts on April 9, 1973, to admit in evidence [208] Exhibit number 31, which is a letter signed by Thomas W. Pearlman, Esq., dated April 5, 1973 and accompanying copy of a death certificate of Raymond Lucas and a copy of a recent decision in the case of Sardonis vs. Sardonis. There being nothing further, the record was closed in Boston, Massachusetts on April 9, 1973.

CERTIFICATION

I have read the foregoing transcript and hereby certify that it is a true and complete record of the hearing.

/s/ Margaret E. Kirby
Hearing Assistant

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE SOCIAL SECURITY ADMINISTRATION BUREAU OF HEARINGS AND APPEALS

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION

In the case of

(Claimant)

Belmira Lucas o/b/o Ruby M. Lucas and Darin E. Lucas
Robert E. Cuffee

(Wage Earner) (Leave blank if same as above)

Claim for

Child Insurance Benefits

039-12-1375
(Social Security Number)

This case is before the Administrative Law Judge by an order of remand of the Appeals Council, dated March 14, 1973, authorizing the taking of further evidence in this case pursuant to an order of remand, dated March 2, 1973, of the United States District Court for the District of Rhode Island.

Claimant filed an application for surviving Child Insurance Benefits on behalf of Ruby M. Lucas and Darin E. Lucas on October 24, 1968. This claim was denied initially on September 13, 1969; the denial was affirmed on reconsideration on August 21, 1970, and claimant filed a request for hearing. After a hearing was had, the application was denied and a decision issued by another Administrative Law Judge (formerly called Hearing Examiner) on May 6, 1971. The decision was affirmed on appeal by the Appeals Council which denied review of said decision. As a result of this action, an appeal was taken before the United States District Court

for the District of Rhode Island, which resulted in the instant supplemental hearing.

The purpose of the supplemental hearing was for the taking of additional evidence and findings as to whether a valid common law marriage existed between Belmira Lucas and Robert Cuffee such as to cause Ruby M. Lucas and Darin E. Lucas to fit within the definition of 'child' under Section 216(h)(2)(A) of the Social Security Act, as amended.

SUMMARY OF THE FACTS

All the evidence of record and the testimony from the prior hearing have been reviewed and considered. The findings of fact made by the prior Administrative Law Judge are incorporated herein by reference.

In supplementing her testimony, claimant testified that she learned that Mr. Raymond Lucas, her lawful husband, died on January 19, 1965, she obtained this information on the date of his death from one of his relatives. She stated that she imparted this knowledge to Robert Cuffee at the same time she learned of it. Claimant had known that Mr. Lucas had been ill and incapacitated for approximately 15 years prior to his death. Her relationship with Mr. Cuffee, insofar as the community was concerned, did not vary with the death of Mr. Lucas. In describing her relationship with Mr. Cuffee and with his family, claimant stated that approximately two years after they began living together, that is approximately in 1950, the deceased wage earner purchased and presented her with an engagement ring and a wedding ring which the claimant was wearing at the hearing on the third finger of her left hand. It was noted that some holidays were spent by claimant and the deceased wage earner at the deceased wage earner's mother's house. Claimant and all the children were entertained by the deceased wage earner's mother, Mrs. Madeline Cuffee, and his aunt, Miss Hazel Cuffee. On other holidays the Cuffee's would spend them with the claimant and Robert Cuffee in their home. Claimant indicated that her relatives and the relatives of the deceased wage earner, while treating the union as that of husband and wife, recognized that they had not married and that she was incompetent to marry due to an undisolved lawful union with Mr. Raymond Lucas. The relationship between Madeline Cuffee and Hazel Cuffee, on the one hand, and claimant, on the other, came to an abrupt halt when Robert Cuffee resumed living with his mother. Claimant stated she was unsure whether the children, Ruby and Darin, visited Madeline Cuffee after Robert Cuffee's death.

Claimant testified that the two children involved herein, Ruby M. and Darin E. Lucas, were the children of the deceased wage earner, Robert Cuffee. However, recognizing that she was not lawfully married to Mr. Cuffee, she gave the last name of her lawful husband, "Lucas," to the children born of her union with the deceased wage earner. It is noteworthy that the name of Ruby's father was left blank in the certificate of birth, while that of Darin E., born after Ruby on October 28, 1960, lists Raymond Lucas as the father. As a consequence, when the children were sent to school they used the surname Lucas, in conformity with their certificates of birth. She acknowledged that friends of her four children from her marriage with Raymond Lucas, called her Mrs. Lucas, although she was residing with Mr. Cuffee at the time. Nevertheless, she asserts that in the neighborhood, generally, and among friends she was known as Mrs. Cuffee. She noted that Darin's middle name was the same as his father, Edward, and Ruby was named after one of Robert Cuffee's close friends.

This testimony was generally corroborated by the testimony of Mrs. Gail C. Silva, the claimant's daughter by her marriage with Mr. Lucas. Mrs. Silva testified that she considered the deceased wage earner as her stepfather. He gave her, and the other children, gifts and other presents from time to time, and confirmed that she visited her stepfather's mother and aunt and spent nights at their residence. She acknowledged that at times her mother was referred to by some as Mrs. Cuffee, but at

other times her mother was addressed by others as Mrs. Lucas. "Most" invitations for social functions were addressed to "Mrs. Cuffee."

In 1965 and 1966 the deceased wage earner became increasingly more afflicted with alcoholism and concomitant with the excessive drinking he became excessively violent. As she was fearful for the safety of the children claimant became increasingly disturbed with Mr. Cuffee's conduct and thus sent him to live with his mother.

COUNSEL'S ARGUMENT

Counsel indicated that no formal wedding ceremony or other steps were taken subsequent to the death of Mr. Lucas in order to avoid embarrassment. For that reason no ceremonial marriage had taken place between the deceased wage earner and the claimant after the impediment was removed. Nevertheless, he urged that their relationship be viewed as a common law marriage and from this would flow the entitlement to benefits of Ruby M. and Darin E. Lucas, as legitimate children.

EVALUATION OF EVIDENCE

The central issue to be resolved is whether or not Belmira Lucas, the claimant herein, entered into a relationship with the deceased wage earner, Robert E. Cuffee which, under the law of the State of Rhode Island, could be considered a common-law marriage. If this is established then the children, Darin E. and Ruby M. Lucas would be considered the legitimate offspring of said union and entitled to surviving child's insurance benefits. It is clear that common-law marriage is recognized in Rhode Island. *Holgate* v. *United Electric Railways Company*, 47 R.I. 337. The finding of such relationship may be shown by circumstantial evidence but such evidence must be clear and persuasive. The same case also notes that ". . . where parties who are incompetent to marry enter into an illicit relation with a manifest desire and intention to live in matrimonial union rather than in a state of

concubinage, and the obstacle to their marriage is subsequently removed, their continued cohabitation raises a presumption of an actual marriage immediately after removal of the obstacle, and warrants a finding to that effect," at 340. In a case dealing with the corollary of this principal, it was stated that if the parties enter into a meutricious relationship, in the absence of clear proof to the contrary, the presumption of law is that such meretricious relationship continued. *Ibello* v. *Sweet*, 47 R.I. 480.

In the instant case the facts reveal that claimant, Belmira Lucas, and the deceased wage earner, Robert E. Cuffee, knowingly entered into a meretricious relationship. In arriving at this conclusion the Administrative Law Judge is not unmindful of the fact that the deceased wage earner gave the claimant a so-called engagement ring and wedding ring approximately two years after their relationship started, and due consideration is given to claimant's various assertions. However, an important factor leading to the conclusion that the relationship was one of concubinage is the fact that the children born of the union were not given the surname of the deceased wage earner. They were given the surname of Belmira Lucas' first husband. In fact, Darin's birth certificate lists Raymond Lucas as the father. (Exhibit 19). These, it would appear, are more significant factors than a pair of rings, which may or may not be an empty gesture. Also of some significance is that during the period 1953 to 1960, when the deceased wage earner was an employee of the Providence Journal, Robert Cuffee gave his marital status as "single." (Exhibit 30). These factors when considered together with the fact that both Robert Cuffee and Belmira Lucas realized that they were not free to marry due to the continued existence of Belmira Lucas' lawful spouse, Raymond Lucas, requires the conclusion that both parties recognized that their relationship was illicit and there was no serious mutual intention of entering into a matrimonial relationship. In view of the foregoing, the presumption is that in the absence of clear and convincing

evidence to the contrary such meretricious relationship continued. *Ibello* v. *Sweet, supra.*

Examining the circumstances that transpired after the reported death of Raymond Lucas in January 1965, we see that Robert Cuffee and Belmira Lucas continued to live together. She continued to be known as Mrs. Cuffee to some and as Mrs. Lucas to others. The children, Ruby and Darin, continued to carry the name "Lucas." By late 1965, or sometime in 1966, claimant has given different dates but more recently asserts that it was sometime in 1966, Belmira Lucas and Robert Cuffee went their separate ways. Her testimony is to the effect that he became a severe alcoholic and to avoid any possible harm to herself or the children dispatched him to his mother to live. The deceased wage earner continued to reside with his mother for approximately one and a half to two years before his death.

In view of the established fact that Mr. Cuffee considered himself as "single" prior to the death of Mr. Lucas, the way his relationship with the claimant terminated in 1966 is more compatible with two people living in a concubinous state rather than a matrimonial one. Certainly the continuance of their cohabitation after the death of Raymond Lucas cannot lead to a conclusion any different from that drawn from their relationship prior to the death of Mrs. Lucas. Inasmuch as there was no demonstrable change in their relationship after the death of Mr. Lucas, the clear and convincing evidence required to overcome the presumption of a continuing illicit relationship is utterly lacking. It is recognized that in Robert Cuffee's obituary his mother gave the surviving children's name as "Cuffee." This is the only occasion where they are referred to by their father's surname, and there is no persuasive evidence that they were commonly known by that name after Mr. Lucas' death. Therefore, this must be considered as only one more instance of conflicting evidence, rather than clear and convincing circumstances requiring a conclusion different from that reached herein.

In his brief counsel cites the case of *Sardonis* v. *Sardonis*, 261 A. 22, as being similar to the instant case inasmuch as the man and woman, after the impediments to the creation of a common-law marriage were eliminated, were considered to have entered into a common-law marriage relationship merely by continuing their cohabitation. In that case children of the previously illegitimate union were deemed legitimated by the subsequent common-law marriage of the parents. The *Sardonis* case is predicated on facts which are not present here. In fact, quite the contrary is true. In *Sardonis* the two children born of the union prior to the legitimating of the relationship were given the name of their natural father, Sardonis, not the name of the mother's former husband. In addition, Mrs. Sardonis was known by that name, alone, from the time her relationship with Mr. Sardonis began. It is quite clear they intended to live as husband and wife although not lawfully free to do so at the start of their relationship. Consequently the very factors that led the Court to find the existence of a common-law relationship in the *Sardonis* case are not only lacking in this case, but the very opposite factors are present herein, necessitating an opposite conclusion.

In view of the conclusions reached herein that Belmira Lucas never entered into a common-law marriage with the deceased wage earner, the children, Ruby M. and Darin E. Lucas, are not embraced within the provisions of Section 216(h)(2)(A) of the Social Security Act, as amended, (42 U.S.C. Sec. 416(h)(2)(A)).

FINDINGS

The Administrative Law Judge has carefully considered the entire record in this case and based upon the preponderance of the credible evidence, in addition to the foregoing, makes the following specific findings:

1. Claimant, Belmira Lucas, and the deceased wage earner, Robert E. Cuffee, entered into a meretricious relationship on or about 1948.

2. After the removal of the impediment for a legitimate relationship by the death of Raymond Lucas on January 19, 1965, there were no manifest changes in the relationship between Belmira Lucas and Robert Cuffee.
3. The conduct of the parties both before as well as after the death of Raymond Lucas does not reveal that a serious matrimonial intention existed between the parties.
4. The meretricious relationship between Belmira Lucas and Robert Cuffee never changed to that of a common-law marriage.

RECOMMENDED DECISION

It is the recommended decision of the Administrative Law Judge that Ruby M. Lucas and Darin E. Lucas are not entitled to children's insurance benefits on the wage record of Robert E. Cuffee, deceased.

/s/ Anthony J. Iacobo
ANTHONY J. IACOBO
Adm. Law Judge
Room E-130
John F. Kennedy Federal Bldg.
Boston, Massachusetts 02203

DATE: APR 23, 1973

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of

Belmira Lucas o/b/o Ruby M. Lucas and Darin E. Lucas
(Claimant)

Robert E. Cuffee
(Wage Earner) (Leave blank if same as above)

Claim for

Child's Insurance Benefits

039-12-1375
(Social Security Number)

By order dated March 2, 1973, the United States District Court for the Eastern District of Rhode Island remanded this case (Civil Action Number 4845) to the Secretary of Health, Education, and Welfare.

The court in its opinion and order, after reviewing the record, concluded that the Secretary's decision that the claimant's children received no support or just occasional irregular support from the insured wage earner was supported by substantial evidence. Thus, the children did not meet the definition of "child" under 42 U. S. C. section 416(h)(3)(C)(ii). The court remanded the case for a determination as to whether under section 416(h)(2)(A), Belmira Lucas and the deceased wage earner, Robert E. Cuffee "had a common law marriage which the law would recognize as valid." Should it be proven that a valid common law marriage existed, Ruby Marie Lucas and Darin E. Lucas would become the legitimate children of Robert E. Cuffee and would qualify for surviving child's benefits under the requirements of 42 U. S. C. 402

(d). Thereafter, the Appeals Council remanded the case to an administrative law judge for a supplemental hearing in compliance with the court order, which was held on April 3, 1973.

On April 23, 1973, the administrative law judge issued his recommended decision finding that the claimant Belmira Lucas never entered into a common-law marriage with the deceased wage earner and thus, the children do not qualify under the provisions of 42 U. S. C. 416(h)(2)(A). The administrative law judge held that the claimant, Belmira Lucas and the wage earner entered into a meretricious relationship on or about 1948; that after the removal of the impediment to a legitimate relationship by the death of Raymond Lucas (the claimant's legal spouse) on January 19, 1965, there were no manifest changes in their relationship; that their conduct before as well as after the death of Mr. Lucas does not reveal that a serious matrimonial intention existed; and the meretricious relationship never changed to that of a common-law marriage. At the time of the issuance of his recommended decision, the administrative law judge advised the claimant and her attorney that they may submit to the Appeals Council any comments, exceptions or objections.

The administrative law judges' statements in the prior administrative decisions as to the pertinent provisions of the Social Security Act, the present issue in the case, and the evidentiary facts which were before them are incorporated by reference. By covering letter dated May 2, 1973, claimant's attorney, Mr. Thomas W. Pearlman, submitted a copy of his memorandum in the nature of an appeal to the administrative law judge's recommended decision. The case is now before the Appeals Council for final administrative decision.

The Appeals Council has carefully reviewed the record in the light of the claimant's objections and finds that they are for the most part merely indicative of a general disagreement with the administrative law judge's findings of fact and conclusions of law on the case as a whole.

Accordingly, all of the said objections, some of which are discussed below, are overruled.

Counsel contends that the administrative law judge has misconceived the nature of the common-law marriage under Rhode Island law and has misconstrued the evidence in this case. In his review of the evidence of record, including the testimony of the claimant and her daughter at the supplemental hearing and, the recommended decision of the administrative law judge, counsel, in his able presentation of the claimant's case has viewed the evidence in a light most favorable to the claimant. In doing so, however, he brought to the Appeals Council's attention and stressed those factors which tend to support the claimant's position. On the other hand, the administrative law judge and subsequently the Appeals Council, must weigh all the evidence, whether favorable or unfavorable to the claimant. As the triers of fact, they have the responsibility to decide which evidence is more persuasive and to resolve any conflict concerning the claimant's status in the instant case.

Counsel alleges that the finding, that the meretricious relationship never matured into a common-law marriage upon the death of the claimant's lawful husband because there were no manifest changes in the relationship, misconceives the requirements of common-law marriage under Rhode Island law. In support of his contention, he cites as his authority pertinent sections in American Jurisprudence concerning the general rule, the substantive law and the law of procedure pertaining to presumptions in states that recognize common-law marriages. The Appeals Council finds that the points raised have been adequately discussed in the administrative law judge's recommended decision including the reference to the Holgate case which was cited.

Counsel also contends that if the existence of a common-law marriage is this case is not sufficiently proved and thus if the children are found to be and remain illegitimate, a fundamental question is raised as to the constitutionality of a social security law which distinguishes

between legitimate and illegitimate children and denies equal protection as demanded by the 14th Amendment to the illegitimate children. Counsel specifically refers to section 216(h)(3)(c) of the Social Security Act and states that it deliberately excludes illegitimate children from benefits unless very rigorous conditions of paternity and living with or contributing to their support are met but which are not required in the case of legitimate children. The Appeals Council has attempted to comply with this specific instruction of the Court, and, in any event, the Appeals Council has no power to rule upon the constitutionality of the federal statute, which is the subject of its delegation to administer. The Appeals Council notes that the court's Opinion and Order states that ". . . this action shall be and is remanded to the Secretary for the taking of additional evidence and findings as to whether a valid common-law marriage existed . . ."

In the instant case, the claimant Belmira Lucas and the wage earner Robert E. Cuffee did not have ". . . a common law marriage which the law would recognize as valid," and thus the children do not qualify for child's benefits under 42 U.S.C. 416(h)(2)(A). Accordingly, the Appeals Council adopts the findings and conclusions in the recommended decision.

It is the decision of the Appeals Council that, the claimant is not entitled to children's insurance benefits on behalf of Ruby M. Lucas and Darin E. Lucas, under the provisions of the Social Security Act, as amended.

APPEALS COUNCIL

/s/ Carl Monk
Carl Monk,
Member

/s/ Norman S. Kerns
Norman S. Kerns,
Member

DATE: MAY 22, 1973

SUPREME COURT OF THE UNITED STATES

No. 75-88

F. DAVID MATHEWS, Secretary of Health, Education and Welfare, APPELLANT

v.

RUBY M. LUCAS, et al.

APPEAL from the United States District Court for the District of Rhode Island.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for oral argument in tandem with No. 74-6212, Norton V. Mathews.

October 6, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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SUPREME COURT, U.S.

No. 75-88

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
APPELLANT

V.

RUBY M. LUCAS, ET AL

APPELLEE

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Belmira Lucas, as mother and next friend of Ruby M. Lucas and Darin E. Lucas, asks leave to file the attached Motion to Affirm to the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Respondent's Affidavit in support of this Motion is attached hereto.

Thomas W. Pearlman

THOMAS W. PEARLMAN,
Counsel for Respondent
812 Industrial Bank Building
Providence, R. I. 02903

CERTIFICATION

I, hereby certify that I did notify the following persons of the pendency of the within Motion by mailing a copy hereof, postage prepaid to: Attorneys Robert H. Bork, Rex E. Lee, William Kanter and Robert S. Greenspan, at the Department of Justice, Washington, D. C. 20530, this 26th day of August, 1975.

Thomas W. Pearlman

LAW OFFICES OF
PEARLMAN & VOGEL
111 WESTMINSTER STREET
PROVIDENCE, R. I. 02903

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-88

CASPAR W. WEINBERGER, SECRETARY OF
HEALTH, EDUCATION AND WELFARE,
APPELLANT

V.

RUBY M. LUCAS, ET AL

APPELLEE

AFFIDAVIT

I, Belmira Lucas, as mother and next friend of Ruby M. Lucas and Darin E. Lucas, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the mother and next friend of the Respondents in the above entitled case.

2. Because of the poverty of myself and said children, we are unable to pay the costs of said cause.

3. We are unable to give security for the same and afford the defense of the appeal to the U. S. Supreme Court.

4. We believe that we are entitled to the redress sought in said case, having won in the United States District Court of Rhode Island.

5. The nature of said cause is briefly stated as follows

> The right of illegitimate children not to be discriminated against as a class by reason of their birth as set forth in Jimenez v. Weinberger, 417 U.S. 628 (1974).

Belmira Lucas

Duly witnessed and sworn to before me, a Notary Public, this 25th day of August, 1975.

NOTARY PUBLIC

My commission expires June 30, 1976.

LAW OFFICES OF
PEARLMAN & VOGEL
111 WESTMINSTER STREET
PROVIDENCE, R. I. 02903

LAW OFFICES OF
PEARLMAN & VOGEL
111 WESTMINSTER STREET
PROVIDENCE, R. I. 02903

No. 75-88

IN THE SUPREME COURT OF THE UNITED STATES

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APPELLANT

V.

RUBY M. LUCAS, ET AL

APPELLEE

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

MOTION TO AFFIRM UNDER RULE 16

Appellees pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court of Rhode Island be affirmed on the ground that the question is so unsubstantial as to not warrant further argument.

Thomas W. Pearlman

THOMAS W. PEARLMAN,
Attorney for Appellee
812 Industrial Bank Building
Providence, Rhode Island 02903

CERTIFICATION

I, hereby certify that I did notify the following named persons of the pendency of the within Motion by mailing a copy hereof, postage prepaid to: Attorneys Robert, H. Bork, Rex E. Lee, William Kanter and Robert S. Greenspan, at the Department of Justice, Washington, D. C. 20530, this 26th day of August, 1975.

Thomas W. Pearlman

LAW OFFICES OF
PEARLMAN & VOGEL
111 WESTMINSTER STREET
PROVIDENCE, R. I. 02903

Supreme Court, U. S.
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NOV 18 1975
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No. 75-88

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

RUBY M. LUCAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE APPELLANT

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

WILLIAM KANTER,
ROBERT S. GREENSPAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-88

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

RUBY M. LUCAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court is not yet reported.

JURISDICTION

The order of the district court, holding unconstitutional certain provisions of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii), was en-

tered on March 21, 1975 (J.S. App. B, pp. 28a-29a).[1] A notice of appeal to this Court was filed on April 15, 1975 (J.S. App. C, p. 30a). On June 4, 1975, Mr. Justice Brennan extended the time for docketing the appeal to and including July 14, 1975. The appeal was docketed on that date. This Court noted probable jurisdiction on October 6, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act deny due process insofar as they condition certain illegitimate children's eligibility for surviving child's insurance benefits upon a showng that a deceased wage-earner was their parent and was, at the time of his death, living with them or contributing to their support.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent provisions of the Fifth Amendment and the Social Security Act are set forth in J.S. App. D, pp. 31a-33a.

STATEMENT

1. This is an appeal from a decision of a single-judge district court holding unconstitutional Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Secu-

[1] The court's order does not refer directly to the constitutional issue, but that order is based upon the court's decision, set forth in its opinion, that the statutory bar to the payment of benefits to appellees was unconstitutional.

rity Act, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii). The constitutionality of these statutes is presently before the Court in *Norton* v. *Mathews*, No. 74-6212, question of jurisdiction postponed until hearing on the merits, June 30, 1975. We therefore only briefly summarize the statutory scheme here.

Surviving child's insurance benefits are payable to children under the age of 18 (or, in the case of full-time students, under the age of 22) who were dependent upon a deceased wage-earner at the time of his death. Section 202(d)(1)(B) and (C) of the Act. The Act establishes a presumption of dependency in the case of legitimate children who have not been adopted by another individual. Section 202(d)(3) of the Act. A similar presumption applies to illegitimate children who satisfy certain statutory criteria.[2]

Children who do not satisfy any of these criteria, *i.e.*, legitimate children who have been adopted by another individual and illegitimate children who do not have any of the statutory indicia of dependency, are not presumed to have been dependent upon their deceased father. In order to receive surviving child's insurance benefits, such children must show that the

[2] Dependency is presumed in the case of an illegitimate child (1) whose parents went through a marriage ceremony that was rendered invalid by a non-obvious legal impediment or (2) whose father (a) acknowledged his paternity in writing, (b) had been decreed by a court to be the child's father, or (c) had been ordered by a court to support the child because the child was his son or daughter. Sections 202(d)(3) and 216(h)(2)(B) and (3) of the Act.

deceased wage-earner had been living with them or contributing to their support at the time of his death. Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Act.

2. Appellees are illegitimate children who applied for surviving child's insurance benefits on the earnings account of their deceased father, Robert E. Cuffee. The Secretary determined that appellees had failed to demonstrate either that any of the statutory presumptions of dependency were applicable to their case (Tr. 43)[3] or that Cuffee had been contributing to their support or living with them at the time of his death (Tr. 43, 45). The Secretary accordingly denied their application for benefits after a full administrative hearing (Tr. 4, 45).

Having exhausted all available administrative remedies, appellees commenced this suit in the United States District Court for the District of Rhode Island pursuant to Section 205(g) of the Act, claiming, first, that the Secretary's decision was not supported by substantial evidence and, subsequently, that Sections 202(d)(3) and 216 (h)(3)(C)(ii) of the Act deny due process insofar as they require certain illegitimate children to demonstrate dependency as a condition of eligibility for surviving child's insurance benefits.[4] The district court held those statutory pro-

[3] "Tr." refers to the transcript of the administrative proceedings.

[4] The district court initially held that the Secretary's factual determination that appellees did not meet the requirements of the statute was supported by substantial evidence,

visions unconstitutional (J.S. App. A, pp. 1a-27a) and ordered the payment of benefits to appellees (J.S. App. B, pp. 28a-29a).

ARGUMENT

THE STATUTORY SCHEME DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

The constitutional issue involved in this case, and the sole question presented, is identical to the constitutional issue raised in *Norton* v. *Mathews*, No. 74-6212, question of jurisdiction postponed to hearing on the merits.[5] That question concerns the constitutional validity of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii), which condition certain ille-

but remanded the matter to the Secretary to determine whether appellees were legitimate children under state law as the issue of a valid common law marriage (J.S. App. A, pp. 6a-8a). After the Secretary determined that they were not, appellees sought reversal of the Secretary's decision, and also challenged for the first time the constitutionality of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Act. The district court found the Secretary's determination concerning common law marriage to be supported by substantial evidence and referred the issue of the constitutionality of the statute to a three-judge court. When appellees disavowed their original motion to enjoin application of Section 216(h)(3)(C)(ii), the three-judge district court that had been convened remanded the case for determination by a single judge (J.S. App. A, pp. 9a-10a). See *Flemming* v. *Nestor*, 363 U.S. 603.

[5] Unlike *Norton*, this case presents no issue concerning the jurisdiction of either the district court to hear the case initially or of this Court to hear the appeal.

gitimate children's eligibility for child's insurance benefits upon a showing that the deceased wage-earner was their father and was, at the time of his death, either living with them or contributing to their support. In *Norton*, a three-judge district court sustained the constitutionality of the statutory scheme. In the instant case, a single-judge district court has held that scheme unconstitutional.

In our *Norton* brief (pp. 27-43), we show that Sections 202(d)(3) and 216(h)(3)(C)(ii) fully comport with the Due Process Clause of the Fifth Amendment, and we refer the Court to that discussion in support of our appeal here.[6] In summary, we argue in *Norton* that the requirement that certain illegitimate children demonstrate that they were dependent on their father when he died is reasonably related to legitimate legislative purposes. We show that the Social Security Act is intended to provide benefits to surviving dependent children of deceased wage-earners, not to those who might have claimed support but did not do so; it is designed to replace lost support, not to provide a supplementary income to the needy. In order to further this purpose effectively, it is appropriate to avoid the serious administrative burdens that would result from the need to make dependency determinations in each case. Accordingly, Congress has identified those situations in which there is a plausible basis for presuming dependency, and has

[6] We are furnishing counsel for appellees with a copy of our brief in *Norton*.

required proof of actual support only in those cases in which there is no basis for such a presumption.[7]

CONCLUSION

For the reasons stated in our brief in *Norton*, the judgment of the district court should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

WILLIAM KANTER,
ROBERT S. GREENSPAN,
Attorneys.

NOVEMBER 1975.

[7] We note also (*Norton* brief, pp. 40-41) that the requirement that the claiming child prove either that he was living with or supported by the wage-earner at the time the wage-earner died tends to eliminate the need to make paternity determinations in difficult cases and reduces the likelihood of fraudulent claims.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-88

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellant,

v.

RUBY M. LUCAS, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF APPELLEES

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IN THE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF APPELLEES

MISCELLANEOUS

House-Senate Conference Committee Report, 111 *Cong. Rec.* 18387 (1965)

RELEVANT STATUTES

42 U.S.C. § 402(d)(1):

Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child –

(A) has filed application for child's insurance benefits,

(B) At the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual –

* * *

(ii) if such individual has died, at the time of such death,

* * *

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . . .

42 U.S.C. § 402(d)(3):

A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and –

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

42 U.S.C. § 416(h)(2)

(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(b), would have been a valid marriage.

42 U.S.C. § 416(h)(3)

An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not

deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

* * *

(C) In the case of a deceased individual–

(i) such insured individual–

(I) had acknowledged in writing that the applicant is his son or daughter,
(II) had been decreed by a court to be the father of the applicant, or
(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

QUESTION PRESENTED

Does 42 U.S.C. § 416(h)(3)(C)(ii) violate the Due Process Clause of the Fifth Amendment in that it requires certain illegitimate children to prove that they were receiving support from their father at the time of his death yet does not require legitimate children and certain other illegitimate children to carry this burden?

STATUTORY SCHEME

A child of an eligible wage-earner is entitled to Surviving Child's Insurance benefits unless the wage-earner was not living with or contributing to the support of the child and 1) the child is neither the legitimate nor adopted child of the wage-earner, or 2) the child has been adopted by some other individual. 42 U.S.C. § 402(d)(3). Thus, apart from the situation of adopted children, legitimate children are automatically eligible to receive benefits while illegitimate children are not. Legitimate children need not overcome any further hurdles while illegitimate children must qualify under some other provision of the Social Security Act.

Illegitimate children may qualify for benefits if 1) under the laws of the state in which the insured wage-earner was domiciled, they would have the same status relative to taking intestate personal property as legitimate children, 2) their parents went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment, would have been a valid marriage, or 3) the wage-earner a) had acknowledged in writing that they are his children, b) had been decreed by a court to be their father, or c) had been ordered by a court to contribute to their support because they are his children. 42 U.S.C. § 416(h)(2)(A) and (B), 42 U.S.C. § 416(h)(3)(C)(i)(I), (II), and (III).

Illegitimate children who do not fall into any of these sub-classes must prove to the satisfaction of the Secretary that the wage-earner was their parent and was living with them or contributing to their support at the time of his death. 42 U.S.C. § 416(h)(3)(C)(ii). Thus, illegitimate children who do not qualify under 42

U.S.C. §416(h)(2)(A) or (B) or 42 U.S.C. §416(h)(3)(C)(i)(I), (II), or (III) must bear a heavy burden that legitimate children and illegitimate children who qualify under these provisions need not bear.

STATEMENT OF THE FACTS

Although never ceremonially married, Belmira Lucas, the plaintiff, and Robert Cuffee, the deceased wage-earner, lived together for eighteen years, from 1948 to 1966. Two children were born of this union: Ruby Marie Lucas on February 7, 1953, and Darin Edward Lucas on October 28, 1960. In 1966 plaintiff and Mr. Cuffee separated for about eighteen months, after which he died in June of 1968. On October 24, 1968, plaintiff filed for Surviving Child's Insurance benefits on behalf of the minor children on the earnings record of Mr. Cuffee. The Secretary denied benefits to the applicants, despite the finding of the Hearing Examiner at page 72 of the transcript of the hearing held on March 24, 1971* that Mr. Cuffee was the father of the two children. The Secretary found that Mr. Cuffee had not acknowledged his paternity in writing, had never been decreed by a court to be the father of the applicants, and had never been ordered by a court to contribute to the support of the applicants because they were his children. 42 U.S.C. §416(h)(3)(C)(i)(I),

*See Appendix page 36 which states as follows: "the thrust of the evidence rather clearly indicates that he was the father of both Darin Edward Lucas and Ruby Marie Lucas. However, in this particular matter a finding that he was the father of these children is academic unless it can be established by the evidence that he was contributing to the support of these children at the time that he died."

(II), and (III). The Secretary also found that plaintiff had not met the burden of proving that Mr. Cuffee had been living with or contributing to the support of the children at the time of his death. 42 U.S.C. §416(h)(3)(C)(ii).

Plaintiff then brought an action in the District Court of Rhode Island to review the Secretary's decision. The Court upheld the Secretary's findings but remanded the case for an administrative determination as to whether the children were the issue of a valid common law marriage under Rhode Island law, thus entitling them to take by intestacy a share of their father's personal property. 42 U.S.C. §416(h)(2)(A). The Secretary found that plaintiff and Mr. Cuffee had never entered into a valid common law marriage.

Plaintiff sought reversal of the Secretary's decision in the District Court on two grounds: that the Secretary had erred in his assessment of the evidence and the applicable Rhode Island law, and that 42 U.S.C. §416(h)(3)(C)(ii) was unconstitutional because it conditioned the applicants' eligibility on proof of actual dependency without requiring a similar showing of legitimate children and certain illegitimate children. Plaintiff moved for summary judgment.

As to the first claim, the Court affirmed the Secretary's findings. As to the second claim, the Court found that 42 U.S.C. §416(h)(3)(C)(ii) violated the Due Process Clause of the Fifth Amendment. *Lucas v. Mathews, Secretary, Department of Health, Education & Welfare*, 390 F. Supp. 1310 (D., R.I., 1975). The Secretary has appealed. A copy of said opinion is printed in the Jurisdictional Statement beginning at page 1a.

ARGUMENT

I.

ILLEGITIMACY IS A SUSPECT CLASSIFICATION, AND THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT CANNOT WITHSTAND STRICT SCRUTINY.

It is well-established that standards of equal protection are inherent in the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Richardson v. Belcher*, 404 U.S. 78 (1971). This Court has developed alternative approaches to the examination of legislative classifications in the light of equal protection challenges. If the classification is a suspect classification, strict scrutiny is appropriate. *Frontiero v. Richardson*, 411 U.S. 677 (1973). If the classification is not suspect, then it must bear a rational relationship to a legitimate governmental purpose. *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Flemming v. Nestor*, 363 U.S. 603 (1960).

A suspect class is one which has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). A class is even more suspect if its membership is determined by the presence of an immutable characteristic acquired at birth. *Frontiero v. Richardson, supra.*

A classification based on illegitimacy has all of the attributes of a suspect classification. Illegitimates have

always been discriminated against in America. They have been made to suffer the social reproach heaped on them by others. They have suffered at the hands of the majoritarian political process. Illegitimacy is an immutable characteristic acquired at birth. This Court has described the situation of illegitimates well:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-176 (1972).

Illegitimate children thus desperately need the protection given by the judicial system to suspect classes. See *Lucas v. Mathews, supra.*

This Court has stated that

> "strict scrutiny means that the [government's] system is not entitled to the usual presumption of validity, that the [government] rather than the complainants must carry a 'heavy burden of justification,' that the [government] must

> demonstrate that its . . . system has been structured 'with precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives . . ." *San Antonio Independent School District v. Rodriguez*, supra, 411 U.S. at 16-17.

If strict scrutiny is applied in the instant case, it is clear that 42 U.S.C. § 416(h)(2)(C)(ii) cannot stand, even if we accept for the moment the Secretary's strained interpretation of the statute's purpose. The Secretary claims that Congress intended that child's survivor benefits should replace only the actual support lost by virtue of the wage-earner's death and did not intend that benefits should be given to those children who had a right to support. The statutory scheme is not structured with precision or tailored narrowly to achieve the purpose claimed by the Secretary. Legitimate children are irrebuttably presumed to have received support from the wage-earner at the time of his death–yet it must be true that many legitimate children have not in fact received such support. Most illegitimate children do not have the benefit of the presumption, although many, if not most, may in fact have received such support. At any rate, it is the government that must carry the heavy burden of justification, a burden that it cannot meet.

II.

IF THIS COURT DECLINES TO HOLD THAT ILLEGITIMACY IS A SUSPECT CLASSIFICATION, THE STATUTE IS UNCONSTITUTIONAL BECAUSE THE CLASSIFICATION DOES NOT BEAR A RATIONAL RELATIONSHIP TO A LEGITIMATE GOVERNMENTAL PURPOSE.

If this Court declines to hold that illegitimacy is a suspect classification, then the classification must bear a rational relationship to a legitimate governmental purpose. *U.S. Department of Agriculture v. Moreno, supra.* Although *Dandridge v. Williams*, 397 U.S. 471 (1970), stands for the proposition that in the area of economics and social welfare the test is whether the classification has some reasonable basis, *Dandridge* is distinguishable since it involved the allocation of finite state resources, an element that is completely missing from the instant case. See *Jimenez v. Weinberger, Secretary, Department of Health, Education & Welfare*, 417 U.S. 628 (1974). Here there are no implications for our system of federalism requiring deference to the decision of a state legislature, as were present in *Richardson v. Belcher, supra, San Antonio Independent School District v. Rodriguez, supra,* and *Labine v. Vincent*, 401 U.S. 532 (1971). The rational relationship in cases such as the instant case must be clear and strong. Child's survivor benefits may be indispensable to the health and well-being of children such as the applicants. See *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973). And this Court has recognized the discrimination against illegitimate children in our society and has been exacting when

dealing with statutes such as the one at issue here. *Jimenez v. Weinberger, supra; Weber v. Aetna Casualty & Surety Co., supra;* see also *Levy v. Louisiana,* 391 U.S. 68 (1968) and *Glona v. American Guarantee & Liability Insurance Co.,* 391 U.S. 73 (1968).

Before the rational relationship test can be applied, the Congressional purpose must be determined. The final and definitive statement of the purpose of the statute can be found in the House-Senate Conference Committee Report at 111 *Cong. Rec.* 18387 (1965)–"A child would be paid benefits based on his father's earnings without regard to whether he has the status of a child under State inheritance laws if the father was supporting the child *or had a legal obligation to do so*" (emphasis added). Thus, Congress realized that those who were not in fact receiving support at the time of the wage-earner's death but who had a legal right to such support had as great a need for surviving child's benefits as those who were receiving such support. Unfortunately, when Congress attempted to achieve this commendable purpose through the statute, it did not measure up to the task.

In *Jimenez,* this Court ascertained the purpose of the Social Security Act in providing support for the dependents of a disabled wage-earner. In that case, as here, the Secretary claimed that the Social Security Act was intended to replace only the actual support lost by virtue of the wage-earner's inability to earn income (in that case due to disability and here due to death). But this Court emphatically rejected this claim:

> "Under this view the Act's purpose would be to replace only that support enjoyed prior to the onset of disability; no child would be eligible to receive benefits unless the child had experienced actual support from the wage earner prior to the disability and no child born after the onset of the wage earner's disability would be allowed to recover. We do not read the statute as supporting that view of its purpose." 417 U.S. at 634.

Thus, this Court has established that the true purpose of the Act is the purpose that is argued for in this brief.

The statutory scheme involved in the instant case is not rationally related to the purpose intended by Congress, that of supplying benefits both to children who received support and to children who had a legal right to support. Legitimate children and both subclasses of illegitimate children stand on equal footing with regard to their right to paternal support. *Gomez v. Perez,* 409 U.S. 535 (1973). Since 42 U.S.C. § 416(h)(3)(C)(ii) requires certain illegitimate children who already possess this right to support to prove actual support, without requiring such a showing by legitimate and certain other illegitimate children, the statute violates the Due Process Clause of the Fifth Amendment.

The statute is unconstitutional even under the Secretary's interpretation of its purpose. Under his interpretation, illegitimates who do not qualify under one of the other provisions of the Act are required to prove support because of a factor over which they have no control. They are treated differently because their fathers have not fulfilled their legal obligations to support them. The statute punishes them for having been neglected. The purpose claimed by the Secretary is not a legitimate governmental interest.

In addition, the statutory scheme is not rationally related to this purpose. As in *Jimenez,* legitimate and

certain illegitimate children are irrebuttably presumed dependent upon the parent, while all other illegitimate children "are denied a parallel right to the dependency presumption under the Act." 417 U.S. at 635. Certainly many legitimate children who receive benefits did not in fact receive support at the time of the wage-earner's death. Certainly many illegitimates who qualify for benefits under 42 U.S.C. § 416(h)(2)(A) or (B) or 42 U.S.C. § 416(h)(3)(C)(i)(I), (II), or (III) did not in fact receive such support. And certainly many, if not most, illegitimate children who did not qualify under these provisions did in fact receive such support. There is no reason whatsoever to assume that more legitimate children and more illegitimate children who qualified for benefits under these provisions received support than did illegitimate children who did not qualify under these provisions. The Secretary has presented no hard evidence to support this assumption. See *Frontiero v. Richardson, supra.* Moreover, this unfounded assumption denigrates this sub-class of illegitimate children. It presumes that such illegitimates are less desirable in the eyes of their parents and are less likely to receive their love and support. This attitude can only serve to perpetuate the discrimination directed against these helpless and innocent children.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Court should declare 42 U.S.C. sec.

416(h)(3)(C)(ii) unconstitutional and affirm the judgment of the District Court of Rhode Island.

Respectfully submitted,

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